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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH BAXTER, ET AL., PETITIONERS

v.

NICHOLAS A. PALMIGIANO

JERRY J. ENOMOTO, ET AL., PETITIONERS

v.

JOHN WESLEY CLUTCHETTE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the question whether the Due Process Clause requires prison disciplinary hearings to be conducted with trial-type procedures

more formal than those enunciated by this Court in *Wolff* v. *McDonnell*, 418 U.S. 539.

INTEREST OF THE UNITED STATES

In *Wolff* v. *McDonnell*, 418 U.S. 539, this Court resolved many questions concerning the nature and extent of procedural safeguards that the Constitution requires at a prison disciplinary hearing. Similar questions are presented in the instant cases. Although these cases involve directly only the practices of prisons in California and Rhode Island, the Court's resolution of the constitutional issues raised will have a direct impact on the existing practices and procedures for management and control of inmates in all other prison systems, including the federal prison system.

The federal prison population represents approximately one-ninth of the Nation's confined offenders. The Attorney General presently has custody over 23,500 inmates, incarcerated in 50 institutions of various types throughout the country. During fiscal 1975, the Federal Bureau of Prisons conducted approximately 24,000 misconduct hearings at these institutions. Since this Court's decision in *Wolff*, the Bureau has twice modified its hearing procedures; additional efforts to improve these proceedings are ongoing. Resolution of the issues in these cases could have a substantial impact on discipline and control in federal prisons, and a ruling requiring all prison disciplinary proceedings to be conducted according to any particular set of inflexible rules may both seriously interfere with the orderly administration of federal prisons and inhibit the continuing development and revision by the Bureau of its disciplinary procedures.

STATEMENT

No. 74–1187—Baxter v. *Palmigiano*

Respondent, an inmate of the Rhode Island Adult Correctional Institutions, brought a civil rights action seeking injunctive and declaratory relief (pursuant to 42 U.S.C. 1983 and 28 U.S.C. 1343(3)) in the United States District Court for the District of Rhode Island.[1] He alleged that an institutional disciplinary

[1] We believe that there is a substantial question whether No. 74–1187 is properly before the Court. The inmate's civil rights action attacked the constitutionality of the regulations of Rhode Island's Adult Correctional Institutions. These regulations, which were adopted in compromise of the litigation in *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.I.), apply to all inmates in every state prison and appear to be of statewide applicability. Constitutional challenges seeking injunctions against regulations of statewide applicability must be heard by district courts of three judges (28 U.S.C. 2281). In an exhaustive discussion of the applicability of Section 2281 to due process challenges to prison regulations, the Fifth Circuit, *en banc*, has unanimously held that in situations of this sort a three-judge court must be convened. See *Sands* v. *Wainwright*, 491 F. 2d 417, certiorari denied sub nom. *Gujardo* v. *Estelle*, 416 U.S. 992. Cf. *McCarty* v. *Woodson*, 465 F. 2d 822 (C.A. 10). The First Circuit itself appears to have recognized that challenges to the rules established in *Morris* might require a three-judge district court, although it was not required to reach that question in *Souza* v. *Travisono*, 498 F. 2d 1120, which involved only a challenge to the practices at a single institution. If a three-judge district court was required to hear Palmigiano's case, the judgment of

hearing, which had led to his placement in "punitive segregation," had been conducted in violation of the Due Process Clause of the Constitution because prison officials had not allowed his attorney to be present during the hearing.[2]

the court of appeals should be vacated and the case remanded with instructions to convene such a court.

It may be, however, that because the state's procedures grew out of federal litigation and were embodied in a judicial decree as well as in the State's formal regulations, the single district court had jurisdiction. No apparent purpose would be served by convening three judges to pass upon the adequacy of rules over which the single judge, who approved the settlement, possesses continuing jurisdiction (see *Morris* v. *Travisono*, 509 F. 2d 1358 (C.A. 1)). What is more, a state policy adopted only in compromise of litigation may not be the sort of state policy that must be secured against "improvident doom" at the hands of a single judge. On the other hand, it could be argued that the state's unwillingness to go further without additional judicial compulsion is a policy of statewide applicability, even though not embodied in a formal regulation; see *Sands*, *supra*, holding that a three-judge court must be convened to consider a constitutional challenge to the unwillingness of state officials to have *any* regulations. Perhaps there should have been a three-judge court in the original *Morris* litigation. We do not pursue these arguments further, for the federal government has no independent interest in their resolution.

There appears to be jurisdiction over No. 74–1194. As the court of appeals held when the case was first before it (*Clutchette* v. *Procunier*, 497 F. 2d 809, 811–812), the constitutional challenge was to the procedures in use at only a single prison, and the case was thus properly before the single district judge. See also *Wolff* v. *McDonnell*, 418 U.S. 539, 542, n. 1; *Board of Regents* v. *New Left Education Project*, 404 U.S. 541.

[2] Respondent Palmigiano presently is serving a life sentence for murder. According to the first opinion of the court of appeals (487 F. 2d 1280, 1281–1282), a fellow prisoner became ill during the evening of November 11, 1972. The corrections officer on duty, after visiting the ailing inmate, summoned medical help. A delay ensued while assistance was sought from a nearby hospital. No medical assistance had been provided by 8:50 p.m., and respondent advised the other prisoners not to return to their cells for the 9:00 lock-up, in order to protest the "failure to provide medical attention."

Correctional officers charged respondent with inciting a disturbance which might have resulted in a riot. Respondent was permitted to consult with his attorney before entering the hearing room. The hearing officer advised respondent that he had the right to remain silent, but that his silence would be held against him. Respondent also was advised that his conduct might be a violation of the State's criminal law. Respondent availed himself of the assistance of the counsel-substitute provided by the institution's rules and remained silent. The disciplinary board found that respondent had committed the infraction as charged and recommended that he be placed in punitive segregation for thirty days and that he be considered for possible downgrading in classification.

Following an evidentiary hearing, the district court denied relief. The court concluded that respondent had been afforded due process of law; he had been given notice of the claimed violation, an opportunity to confer with counsel prior to the hearing and to be represented by counsel-substitute before the disciplinary board, an opportunity to explain his conduct, the right to call witnesses, had been informed of the evidence against him, and the decision of the disciplinary board was based on facts rationally determined.

The court of appeals reversed, holding that respondent "was denied due process in the disciplinary hearing only insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel within the hearing." *Palmigiano* v. *Baxter*, 487 F. 2d 1280, 1292 (C.A. 1).

This Court subsequently (418 U.S. 908) granted certiorari, vacated the judgment, and remanded for further consideration in light of *Wolff* v. *McDonnell,* 418 U.S. 539, which had been decided in the interim.

On remand, the court of appeals reaffirmed its prior holding that if the inmate is informed that his silence will be used against him, or if his testimony is compelled, he must be told that any testimony he may give cannot be used against him in subsequent criminal proceedings. The court amended its opinion, however, by withdrawing its previous declaration that prison officials have the authority to compel testimony and (correspondingly) to confer "use" immunity. In its stead, the court held that (Pet. No. 74-1187 App. 13):

> An inmate subjected to such interrogation is entitled to be advised of his right to remain silent, and cannot be further interrogated should he choose not to speak. His silence may not be used against him at that time or in future proceedings.

The court also modified its holding with respect to retained counsel at disciplinary hearings. It held (*id.* at 14):

> * * * [I]n cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution.

No. 74-1194—Enomoto v. *Clutchette*

Respondents, inmates of the California penal institution at San Quentin, brought a civil rights action in the United States District Court for the Northern District of California. They alleged that almost every particular of the disciplinary procedings in that institution violate the Due Process and Equal Protection Clauses.

After an evidentiary hearing, the district court granted substantial relief, holding that the disciplinary procedures employed at San Quentin are constitutionally infirm because they do not provide for adequate notice of the charges, the right to call and cross-examine witnesses, the right to counsel or counsel-substitute, a neutral and detached hearing body, a written finding of facts or a uniform notice of a right to appeal the decision. The court enjoined state officials from conducting further disciplinary proceedings under the procedures then in effect and ordered prison authorities to submit a plan to bring the conduct of disciplinary committee hearings into conformity with the court's opinion. The district court concluded that these procedures must be used whenever violations of prison rules would be punishable by (1) indefinite segregation; (2) increase in the prisoner's sentence; (3) fine or forfeiture; (4) isolation longer than ten days; or (5) referral to local authorities for criminal prosecution. *Clutchette* v. *Procunier,* 328 F. Supp. 767, 784–785 (N.D. Cal.).

The court of appeals affirmed. It modified the judgment to require the procedures to be used, as well, for any "temporary suspension of 'privileges,' by restricting the prisoner's activities to a greater extent than the general prison population" (*Clutchette* v. *Procunier*, 497 F. 2d 809, 815 (C.A. 9)).

The panel granted rehearing to assess the impact of *Wolff* on its decision, and modified its opinion in several particulars. *Clutchette* v. *Procunier*, 510 F. 2d 613 (C.A. 9). While acknowledging this Court's holding that the *Wolff* requirements might not be required in proceedings involving lesser penalties such as the loss of privileges, the court below found that "some process is due to prisoners whose privileges are to be removed" (510 F. 2d at 615). The Court concluded that if an inmate is subjected to a loss of a privilege, he must be given timely notice of the reasons and an opportunity to respond.[3] The court also

[3] The Bureau of Prisons complies with the procedures spelled out by the court of appeals for cases in which an inmate is involuntarily deprived of "privileges." See the Appendices to this brief, *infra*, pages 55–93. Because the Court's holding with respect to "privileges" will not affect the Bureau, we do not address the question at length. In our view, however, the Constitution does not require any particular form of procedures to be accorded in such situations. Cf. *Wolff*, *supra*, 418 U.S. at 571–572, n. 19. The Due Process Clause requires procedural protections only when the government seeks to deprive an inmate of a "liberty" or "property" interest so important that the deprivation amounts to "grievous loss." The Court has carefully identified, in all of its due process cases, both the source of the protected liberty or property interest (see, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564; *Wolff*, *supra*, 418 U.S. at 557–558) and the attributes of that interest that make the deprivation a source of "grievous loss" (see, *e.g.*, *Goss* v. *Lopez*, 419 U.S. 565, 575–576).

It is difficult to understand why ordinary prison "privileges" constitute a protected liberty or property interest. *Roth* held that such interest can be created only by operation of state law and must amount to more than a unilateral expectation that benefits presently enjoyed will continue, unchanged, into the future. If the teacher's expectation of continued employment in *Roth* was neither a liberty nor a property interest, the inmate's unilateral expectation of future enjoyment of minor privileges is neither a liberty nor a property interest. So, too, it is difficult to understand why the deprivation of such privileges is "grievous loss," unless that term has come to mean any loss that qualifies as the loss of a liberty or property interest. The decision of the court of appeals would redact "grievous" from "grievous loss," declaring that all "loss" must be "grievous." We submit that some deprivation of privileges is "de minimis" (as that term was used in *Goss*, *supra*), and that the Constitution does not require procedural trappings to attend administrative decisions about their disposition.

directed that (except in a proceeding for an infraction that is also a crime) prison officials must enter in the record of the proceedings, and make available to the inmate, an explanation of the reasons for any decision to decline to allow an inmate to confront or cross-examine witnesses; failure to give adequate reasons constitutes "prima facie evidence of abuse of discretion" (*id.* at 616). The Court declined to modify its prior ruling (497 F. 2d at 822–823) that a prisoner must be provided with counsel whenever he is required to appear before an institutional disciplinary committee for violation of a prison rule, whenever such alleged violation may also be subject to criminal punishment.

SUMMARY OF ARGUMENT

Wolff v. *McDonnell*, 418 U.S. 539, held that the Due Process Clause of the Constitution requires hearings before serious disciplinary measures can be taken against prison inmates. The Court carefully considered both the interest of the inmate in receiving the benefit of error-free decisionmaking and the needs of the institution in having available methods of discipline that will both preserve order in the closed prison society and, whenever possible, contribute to the rehabilitation of the inmate. Balancing these concerns, *Wolff* concluded that hearings should include notice of charges, the opportunity for the inmate to give his version of events, and a statement of reasons for the decision. The inmate should be allowed to present witnesses and documentary evidence unless doing so would endanger the security of the institution or unduly prolong the hearing. The Court also concluded, however, that the Due Process Clause does not require other procedures sometimes associated with trial-type adversarial hearings, such as confrontation of adverse witnesses, cross-examination, or the right to be represented by counsel.

The courts of appeals in these cases appear to have assumed that *Wolff* left open to further decision all of the types of procedures that it did not hold are required by the Constitution. Accordingly, *Clutchette* held that there is a presumptive right to confront and cross-examine, subject to defeasance only if prison administrators can offer one of four reasons that the court of appeals would find acceptable for denying

the right. Both *Clutchette* and *Palmigiano* held that counsel must be provided to the inmate whenever the infraction of prison rules that had led to his discipline might also be the basis for a criminal prosecution. We submit that these cases misunderstood the nature of *Wolff's* holding; *Wolff* is conclusive not only on the procedures it held that the Constitution requires, but also on the procedures it held the Constitution does not require. The courts of appeals should not undertake to clothe themselves in the discretion *Wolff* left to prison officials, at least in the absence of some evidence that the *Wolff* procedures have provided only illusory protection to the genuine interests of prison inmates.

Should the Court conclude, however, that *Wolff* is not dispositive of this case, we submit that the same considerations that informed *Wolff* should lead the Court now to conclude that the Constitution does not require more formal proceedings prior to the imposition of discipline than those required by *Wolff*. The Bureau of Prisons believes that the far broader requirements imposed by the courts of appeals—the presumptive right to confront and cross-examine adverse witnesses, the related right to full disclosure of all of the evidence of misconduct, and the right to counsel—would undermine the purposes of prison discipline and ignore the unique setting in which it occurs.

Prisons are closed societies of proven lawbreakers under the constant control and supervision of a limited staff. Widespread hostility and frustration make

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the atmosphere frequently tense and volatile. Moreover, inmates who break the "inmates' code" by providing information concerning violations risk reprisals if they are identified. Prison authorities believe that testimonial confrontations between an inmate and staff members or other inmates can be dangerous and should be avoided whenever possible.

The government's interest in prison discipline is not limited to the enforcement of prison rules and the maintenance of security. Rather, such discipline is integrally related to the larger purposes of the institution—rehabilitation of offenders and adjustment of their antisocial tendencies. This relationship calls for substantial flexibility in the disciplinary process, with a wide measure of discretion vested in prison administrators, who are intimately familiar with the inmates and responsible for their rehabilitation and security. Both purposes could be undermined if inmates are free to confront and cross-examine staff members as formal adversaries. Representation by counsel could further interfere with the rehabilitative process by producing undesirable delays in the imposition of sanctions and by shifting the focus of imposition of discipline from rehabilitation to procedural formality.

We submit that these important institutional concerns are more than adequate to counterbalance whatever interest the inmate may have in the limited increment in fact-finding accuracy that might be produced by confrontation and the assistance of counsel. We further believe that, provided certain recognized constitutional procedural minima (spelled out in *Wolff*) are met, prison administrators and the responsible legislative bodies are better suited than courts to strike the proper balance between the competing interests at stake. The courts of appeals gave either no weight or insufficient weight to these institutional concerns.

Both courts also held that counsel was required at the disciplinary hearing, "not because *Wolff* requires it * * * but because *Miranda* requires it in light of future criminal prosecution" (Pet. No. 74–1187 App. 14). We submit that this conclusion misapprehends the source and the scope of this Court's holding in *Miranda* v. *Arizona*, 384 U.S. 436. There is no "custodial interrogation" in disciplinary hearings and therefore no opportunity for interrogating officers to coerce or deceive suspects into abandoning their constitutional rights. Inmates are not questioned in federal hearings unless they volunteer to speak; they can remain silent if they choose. Nor does the hearing constitute custody. Although each inmate is within the custody of the prison, the disciplinary hearing is not a separate custody, for an inmate need not attend his hearing and, if he attends, he is free to leave at any time. The hearing itself is conducted by an impartial hearing officer or officers, and the inmate is entitled to a counsel-substitute. There is simply no private and incommunicado interrogation to which the suspect may be subjected against his will. Because the circumstances that prompted *Miranda* are absent, its remedies should not apply.

What is more, even if the hearing is deemed to constitute "custodial interrogation," it does not follow that

Miranda's prophylactic measures should be extended to such hearings. *Miranda* sought to erect safeguards that would protect the individual's privilege against self-incrimination and his right to counsel at critical stages of a criminal prosecution. But the disciplinary hearing is not part of a criminal prosecution; there is no underlying right to counsel to safeguard, and the inmate, far from having a constitutional "right to remain silent," simply has a privilege to refuse to answer questions that might incriminate him. *Miranda* holds no more than that evidence obtained in breach of its procedures shall not be introduced in a criminal prosecution; it does not compel the use of any particular procedures in a civil proceeding not leading to criminal punishment.

The Bureau of Prisons has been engaged in a continuing process of reevaluation of its procedures; this process reflects a concern with assuring fairness and minimizing the likelihood of arbitrary action, while at the same time remaining sensitive to the special condition of the prision environment. This process has resulted in the evolutionary development of increasingly refined procedures for use in prison discipline, with new procedures being harmonized with the goals of security and rehabilitation. The institution of new procedures ought to be left at this time to prison administrators, rather than being taken over by the courts, as the former are in a far better position to experiment with new procedures in the unique prison setting. The ongoing process should be allowed to continue without being constrained by a Procrustean constitutional

mandate requiring recognition in all prisons of procedural rights not yet widely proven to be desirable or practical.

ARGUMENT

THE PROCEDURES ARTICULATED IN *WOLFF* AMPLY SATISFY THE REQUIREMENTS OF DUE PROCESS IN PRISON DISCIPLINARY PROCEEDINGS

Wolff v. *McDonnell,* 418 U.S. 539, established a number of procedural requirements that would thereafter be required before inmates could be subjected to substantial discipline. These requirements were similar in kind to, although not as extensive as, the procedures required in parole and probation revocation hearings (see *Morrissey* v. *Brewer,* 408 U.S. 471; *Gagnon* v. *Scarpelli,* 411 U.S. 778). Because discipline within the walls of a prison can deprive an inmate of a state-created liberty interest by withdrawing good time credits or by placing him in more restrictive confinement, this Court held that the Due Process Clause requires certain procedures designed to assure sufficient reliability in the fact-finding process leading to the imposition of punishment. But the Court also noted that additional procedures that would cause disciplinary proceedings more closely to resemble criminal trials were not required by the Due Process Clause, and that prison officials were to be accorded discretion to use or not to use additional procedures as they, in the exercise of their informed discretion, judged best (418 U.S. at 563, 566–572). Two vigorous dissents argued that the Court should have gone further and held disciplinary proceedings to the same standards that are required when parole is revoked

(see 418 U.S. at 580–593 (Marshall, J., dissenting); 418 U.S. at 593–601 (Douglas, J., dissenting)).

Even in the light of the Court's express determination that certain choices would be left to the discretion of prison officials, and the dissents' disagreement with that policy, the courts of appeals in these two cases appear to have concluded that *Wolff* left open to later consideration all procedures that it did not hold were required by the Constitution. We disagree with that interpretation of *Wolff* and submit that *Wolff* bound lower courts with respect to the procedures it declined to impose no less than with respect to those it held are required. The courts of appeals usurped the limits of their constitutional powers by undertaking to exercise the discretion *Wolff* left to the responsible prison authorities.

To the extent, if any, that *Wolff* left unsettled the questions on which the two courts below have spoken, we submit that the Court should be guided now by the same considerations that informed *Wolff* itself. We therefore devote this brief to analyzing the underlying issues—we assess the role of discipline in a modern penal institution and weigh the institutional needs against those of the inmates. We substantially track the approach we took in our brief *amicus curiae* in *Wolff* [4] in an attempt to demonstrate why the careful balance of functions struck in that case still is appropriate and permissible under the Constitution.

A. INTRODUCTION

We do not question that it is desirable to have accurate fact-finding in the context of prison disci-

[4] No. 73–679, October Term, 1973.

plinary proceedings, and that is certainly one of the major objectives of the procedures established by the Bureau of Prisons for the conduct of prison disciplinary proceedings. However, the unique conditions of the prison environment and the nature of the interests served by the disciplinary process in that environment require and justify certain differences between those procedures and the procedures that must accompany revocation of probation or parole, notwithstanding that there may be a slightly increased risk of factual mistakes. Moreover, since the impact of prison discipline on the individual, although not unimportant to him, is almost invariably far less grave than the consequences of a criminal conviction or of revocation of parole or probation, more flexible constitutional standards governing the conduct of disciplinary proceedings may be countenanced, particularly as such flexibility serves substantial governmental interests and needs.

While the records in these cases do not reveal all the variations in procedures followed in different jurisdictions in the conduct of prison disciplinary proceedings, it is safe to assume that the *Clutchette-Palmigiano* requirements are not generally observed. Nevertheless, at least with respect to those procedures followed in federal prisons, we submit that constitutional requirements are being fully satisfied. In order to facilitate understanding of the issues, the following table compares the *Wolff* standards and the current procedures of the Bureau of Prisons with the requirements imposed by the courts below.

Cluchette-Palmigiano Procedures **	*Wolff* Procedures ***	Bureau of Prisons Procedures*	
		Disciplinary Segregation, Loss of Good Time, Disciplinary Transfers ****	Other Disciplinary Actions
1. Written notice of the charges.	Written notice of the alleged violation no less than 24 hrs. before appearance before disciplinary committee.	Written notice of the charges no less than 24 hrs. before appearance before the Institution Discipline Committee.	Written notice within 24 hours of the infraction.
2. Opportunity to present witnesses may be limited to prevent repetitiousness.	Inmate is permitted to call witnesses; however, prison authorities have the discretion to refuse to produce witnesses whose appearance may create risk of reprisal or undermine security.	An inmate is permitted to call witnesses, provided that the calling of witnesses will not jeopardize institutional security; repetitive witnesses need not be called and reasons for not calling are documented in the record.	No right to present witnesses.
3. Opportunity to present documentary evidence.	Opportunity to present documentary evidence.	Unavailable witnesses may be asked to submit written statement; other documentary evidence will be received.	Opportunity to present documentary evidence.

Cluchette-Palmigiano Procedures **	*Wolff* Procedures ***	Bureau of Prisons Procedures*	
		Disciplinary Segregation, Loss of Good Time, Disciplinary Transfers ****	Other Disciplinary Actions
4. Privilege of confrontation and cross-examination unless prison authorities specify in writting that the denial was based on concern for reprisals, unmanageability, disruption, or safety of prison personnel.	No right to confront or cross-examine adverse witnesses.	No right to confront or cross-examine adverse witnesses.	No right to confront or cross-examine adverse witnesses.
5. Inmate is entitled to be advised that he has a right to remain silent and cannot be further questioned should he choose not to speak, if the charges may also be the subject of a criminal prosecution.	No warnings with respect to a "right to remain silent."	No warnings with respect to a "right to remain silent."	No warnings with respect to a "right to remain silent."
6. Written statement by the fact-finder of the reasons for its decisions.	Written statement by the fact-finders of the reason for the disciplinary action.	Written statement of the reasons for the actions taken in specific terms.	Inmate will be given a written copy of the decision and disposition.

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Cluchette-Palmigiano Procedures **	*Wolff* Procedures ***	Bureau of Prisons Procedures*: Disciplinary Segregation, Loss of Good Time, Disciplinary Transfers ****	Bureau of Prisons Procedures*: Other Disciplinary Actions
7. Written statement by the fact-finder of all evidence relied upon, which can include only the evidence presented at the hearing.	Written statement by the fact-finder of the evidence relied upon; statement may exclude certain items of evidence when institutional or personal safety are implicated; statement should indicate fact of omission.	Written statement includes a record of the proceedings and the specific evidence relied upon for its decision, unless so doing would jeopardize institutional safety.	Inmate will be given a written copy of the decision and disposition.
8. Right to counsel where violation of the prison rules may also be punishable by state authorities. Right to counsel-substitute in all disciplinary proceedings where inmate is unable competently to handle his case.	No right to counsel; counsel-substitute, in circumstances in which serious sanctions are imposed, where the inmate is illiterate or the complexity of the issue makes it difficult to develop.	No right to counsel; in all cases inmate is offered assistance of a staff member to represent him, who will be chosen by the inmate where feasible.	No right to counsel.

*See Appendix B, *infra*, pp. 60–93.

**See *Clutchette* v. *Procunier*, 497 F. 2d 809, 818–823 (C.A. 9), modified, 510 F. 2d 613 (C.A. 9); *Palmigiano* v. *Baxter*, 487 F. 2d 1280 (C.A. 1), vacated, 418 U.S. 908, modified, 510 F. 2d 534 (C.A. 1).

***See *Wolff*, *supra*, 418 U.S. at 563–572.

****Proceeding before the Institution Discipline Committee concerning serious infractions which may result in disciplinary segregation or transfer, loss of good time, or recommendations to the Board of Parole that an inmate's parole grant be retarded or rescinded are normally preceded by a proceeding before the Minor Dispositions Committee and usually occur where that committee recommends that other than minor sanctions be imposed. See Appendix B, *infra* pp. 70–73. Accordingly, imposition of serious disciplinary measures is usually subject to the procedures in both columns.

As the table shows, all of the *Wolff* standards are met in federal disciplinary proceedings that could result in severe sanctions such as loss of good time or disciplinary segregation.[5] However, both the *Wolff* standards and the procedures of the federal prison system differ substantially from the procedures created by the courts below. Under the requirements of *Clutchette*, there is a presumption in favor of confrontation and cross-examination; it may be rebutted only if prison officials can articulate reasons showing, in the particular case, that it would occasion reprisal, unmanageability, disruption, or endanger the safety of prison personnel. *Clutchette* also precludes the disciplinary committee from considering evidence not presented at the hearing and in the presence of the inmate. Both *Clutchette* and *Palmigiano* direct prison

[5] In the federal system, as in many state systems, prisoners accrue statutory "good time" which, if not forfeited or withheld, results in an early release from the sentence being served. See 18 U.S.C. 4161 *et seq.* In addition, prisoners in the federal system (see 18 U.S.C. 4126, 4162), and many state prisoners, may earn varying types of meritorious or extra good time under discretionary prison rules. Forfeiture of good time also affects eligibility for parole (see 28 C.F.R. 2.2, 2.13), at least when the forfeited good time has not been restored.

As this Court noted in *Wolff*, *supra*, 418 U.S. at 571, n. 19, it would be difficult to distinguish between procedures that are required when good time is forfeited and those that must be extended when disciplinary segregation is imposed. Accordingly, the Bureau of Prisons provides identical procedures prior to imposition of either of these sanctions. As a matter of policy, the federal system has extended the *Wolff* requirements to instances in which the inmate may be transferred for disciplinary reasons or in which the Institution Discipline Committee recommends to the Board of Parole that a prisoner's parole grant be retarded or rescinded. See Appendix B, *infra*, pp. 73–79.

officials to inform the prisoner that he may remain silent if the infraction may be the subject of a later criminal prosecution, and to provide the inmate with counsel if the violation of prison rules may also be punishable as a crime. These additional requirements will not necessarily improve the reliability or fairness of the determination of the factual predicate for imposition of sanctions. In any event, they are unjustified in light of the unique setting in which such disciplinary actions occurs and the multiple purposes of prison discipline within that setting. *Morrissey* held, and *Wolff* reaffirmed, that such factors must be taken into account in determining the procedures required as a matter of due process; thus, the Court stated in *Wolff* that the question of "what procedures due process may require" in a given set of circumstances is to be determined in light of (1) "the private interest that has been affected" and (2) "the precise nature of the government function involved." 418 U.S. at 560.

In mandating the additional procedural requirements that must be followed in any prison disciplinary proceedings which may result in serious sanctions or which could conceivably lead to a criminal prosecution, the courts below did not undertake the functional analysis required by *Wolff* and failed to evaluate properly the purposes, setting, and consequences of prison disciplinary proceedings vis-a-vis the interests of the inmate in enjoying more formal institutional procedures.

B. THE MULTIPLE PURPOSES AND UNIQUE INSTITUTIONAL SETTING OF PRISON DISCIPLINE REQUIRE FLEXIBLE PROCEDURES

Wolff observed that "[p]rison disciplinary proceedings * * * take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so" (418 U.S. at 561). Such persons often "have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life" (*id.* at 562). Within prison walls, the keepers and the kept always remain in close proximity to each other; "[t]ension between them is unremitting," and "[f]rustration, resentment, and despair are commonplace" (*ibid.*). It was in consideration of this context that *Wolff* gave content to the generalities of the Due Process Clause. The Court held that many procedures that must be made available "to free citizens in an open society, or for parolees or probationers under only limited restraints" (418 U.S. at 560) clearly are inappropriate to prisons. Compare this with *Morrissey* v. *Brewer, supra,* 408 U.S. at 483. In so holding, the Court recognized the need for flexibility in handling infractions of prison rules and wisely provided that "the continuing development" of institutional procedures should be left "to the sound discretion of corrections officials" (418 U.S. at 568).

The disciplinary rules of the Bureau of Prisons form part of this ongoing evolutionary process. (Pertinent aspects of the present rules are described in

Appendix A to this Brief.)[6] In developing these rules, the Bureau of Prisons has attempted to take into account the purposes that prison discipline is intended to serve and the unique institutional setting in which it occurs. The result has been a cautious but steady development and refinement of the procedural rights extended to inmates.

The following discussion of factors bearing on the decisions made by federal prison authorities in establishing those rights is not intended to suggest that the Bureau of Prisons has a monopoly of wisdom in these matters, nor that arguments cannot be made in support of a different array of procedures. It is intended, rather, to show that the current rules represent a reasoned and reasonable accommodation of conflicting interests, developed by the authorities who bear the heavy burden of maintaining order in a closed society of atypically disorderly people and of attempting to control and change their antisocial tendencies. We submit that the judgment of the expert administrators on these questions is entitled to considerable weight.

1. *The institutional environment of prisoners is unique*

Prisoners differ from the free society of the world outside in many significant respects. They are, as *Wolff* observed, populated by a group of individuals who have been deprived of their liberty by the state because they have violated one or more of the laws established by society for its orderly governance.

[6] The history of the federal prison system and the development of its disciplinary rules are set forth in the Appendix to our *amicus* brief in *Wolff*.

Wolff, supra, 418 U.S. at 561. "Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends" (*id.* at 561–562).[7] Prison inmates have been consigned to that station in life because they share the common characteristic of having one or more times resorted to seriously illegal methods to achieve their goals or to resolve problems confronting them. In many cases, moreover, the prior offenses for which they are imprisoned will give officials good reason to believe that inmates would "disrupt and exploit the disciplinary process for their own ends" (*id.* at 563).

Many inmates enter prison with feelings of hostility and defeat, perceiving themselves to be the victims of a "bad break" or unfairly convicted, whether or not any objective observer would agree. As one team of commentators has noted (Taft and England, *Criminology* 468–469 (4th ed. 1967)):

> Unconscious of his own more subtle motivations, the inmate exaggerates the "excuse" he finds in the immediate conditions which in-

[7] For example, according to the as-yet unpublished annual report of the Bureau of Prisons for fiscal 1974, more than 52 percent of the inmates in federal prisons at the end of that year had at least one known prior commitment to a state or federal prison (based on a prior conviction) and 27 percent had at least three or more such prior commitments. Nearly 34 percent, moreover, were confined because of violation of the terms of parole or mandatory release. A further unknown proportion of inmates had prior convictions for which they had not been committed. The apparently high rate or recidivism is, of course, not necessarily indicative of the results following release from a *federal* prison.

> fluenced his act. The crankiness of his wife, the stimulus of too much whisky, the "just" rage produced by ill-luck in gambling, his envy at the easy money obtained with impunity not only by other criminals but by exploiters not classified by society as criminals—such "causal factors," superficial or inadequate as they are, must be very clear in the consciousness of the criminal entering prison.

See also Sykes, *Crime and Society* 89–93 (1966). Such a refusal to accept guilt for wrongdoing and a concomitant tendency to project blame on others are often seen in prisoners' attitudes towards events occurring in prison and their responsibility toward them. See, *e.g.*, Halleck, *Psychiatry and the Dilemmas of Crime* 306 (1st ed. 1967); Abrahamsen, *The Psychology of Crime* 110 (1st ed. 1960).[8]

Moreover, the constant exposure of prisoners to the supervision and control of prison staff in this setting may tend, not infrequently, to breed an intense hostility between the two—to a greater extent and with sharper focus than in almost any setting in the outside world. See Sykes, *The Society of Captives* 41–43, 73–74 (1958). The characteristics of prison life and inmate-staff relationships in many prisons (though not necessarily in all federal prisons) thus includes an ever-present potential for explosive confrontations in which prisoners give vent to hostilities and frustrations or members of the staff overreact due to their

[8] Refusal to accept guilt for wrongdoing may be especially prevalent in a penitentiary, where there are older, more criminally sophisticated offenders. Thus, disputation of the charges and emotional confrontations are likely to be especially frequent in prison hearings. See, *e.g.*, Halleck, *supra*, at 110.

sense of belonging to a beleaguered, alienated, and often disliked minority having only tenuous control over the situation. See Gibbons, *Society, Crime, and Criminal Careers* 468–472 (2d ed. 1973); Sykes, *Crime and Society, supra,* at 99–106.

To a substantial extent, this country's adversarial trial system presupposes that hostilities naturally arising from confrontations can be diffused—sometimes by the actions of the hearing official or other authorities, but more often by the fact that the individual affected (and others who have confronted him) can return to their respective homes, avoiding further contact and venting their emotions in less explosive surroundings. Cf. *Wolff, supra,* 418 U.S. at 568.

This is not the case in prisons. Diffusion of antagonisms occurs less readily; the parties always remain in close proximity to each other, and many inmates are characteristically impulsive and action oriented. See Halleck, *supra,* at 284; Eysenck, *Crime and Personality* 144 (1964). Antagonisms sparked or exascerbated by disciplinary proceedings may easily be fanned into flames of violence or mutiny in the close confines of the prison.

Moreover, in situations involving staff members appearing as witnesses, the supervisory relationships essential to achievement of correctional goals may be disrupted or destroyed by the confrontation experience. By placing the inmate in a position of equal contest with correctional officers, confrontation can erode the officers' control and authority. See McCorkle, *Guard-Inmate Relationships in Prison,* in *The*

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Sociology of Punishment and Correction 108–110 (Johnson, Savitz and Wolfgang ed. 1962). The effect of confrontation is potentially even more serious in the case of the inmate-witness who has observed or been the victim of misconduct by another prisoner. The animosity that seems likely to result from a confrontation between inmates in a disciplinary hearing would continue in the close confines of the prison and might result in violent retribution or the need to make extraordinary provisions for protection of the inmate-witness. See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 46 (1967). One of the first principles of the unwritten "inmates code" is that "inmates stick together" and that those who breach the code risk violent reprisal. See Gibbons, *supra,* at 475–479; Ward & Wilner, *The Inmate Code and Attitude Change,* in *Prison Treatment and Parole Survival: An Empirical Assessment,* ch. VI (1971); Sykes & Messinger, *The Inmate Social Code and its Functions,* in *The Sociology of Punishment & Correction,* ch. 14.[9]

[9] Professor Sykes, in discussing the inmate code, writes (*The Society of Captives, supra,* at 87):

"The most obvious social boundry in the custodial institution is, of course, that which exists between captors and captives; and inmates argue fiercely that a prisoner should never give any information to the custodians which will act to the detriment of a fellow captive. Since the most trivial piece of information may, all unwittingly, lead to another inmate's downfall, the ban on communication is extended to cover all but the most routine matters. The bureaucracy of custodians and the population of prisoners are supposed to struggle in silence."

One conclusion that may be drawn from consideration of the prison environment, accordingly, is that direct confrontations between inmates and staff, as well as among inmates, are to be avoided wherever possible. Otherwise, "prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point * * *." *Braxton* v. *Carlson,* 483 F. 2d 933, 941 (C.A. 3). Many inmates fearing retaliation, might refuse to come forward to report or confirm incidents; others might take the risk and lose. And in either event prisons would become less safe for the majority of inmates who adhere to the institution's rules.[10]

2. There is an integral relationship between the rehabilitative purpose of imprisonment and the role of discipline

The role of discipline in prisons today reflects a series of evolutionary changes over the past 200 years. Change has occurred as the result of gradual shifts in public policies and attitudes toward the role of prisons themselves—an evolution that this Court indicated should continue without the imposition of inflexible constitutional constraints. *Wolff, supra,* 418 U.S. at 571–572. The history of this evolution reveals that as the purposes to be served by imprisonment have changed, so have the nature and role of discipline

[10] We acknowledge, of course, that lack of confrontation could increase the chance of false accusations and unwarranted discipline. Prison officials can compensate in part by viewing with skepticism the reports of inmates, but even so the problem remains. Nevertheless, prison officials believe that the costs of error are more than outweighed by the difficulties confrontation would create.

within the prisons. See, *e.g.*, Taft & England, *Criminology,* ch. 23 (4th ed. 1967); Tappan, *Crime, Justice and Correction,* ch. 20 (1960).

Forty-five years ago, when the Federal Bureau of Prisons was created, the federal government maintained one institution for delinquent youth, one institution for women, three penitentiaries, and a detention facility—all operating autonomously. See Tappan, *supra,* at 619–620; Huston, *The Department of Justice* 204–206 (1967). Federal prisons of the time were candidates for praise by the 19th century warden who stated that prisons "should be terrifying, dark, and comfortless abodes of guilt and wretchedness." These penitentiaries were isolated, forboding places, with punishment their sole objective. Communication and freedom of movement were viewed as privileges—and the existence of too many privileges was thought to undermine discipline and the security of the institution. Discipline was authoritarian. Penalties ranged in harshness from several days' isolation on bread and water to forfeiture of all good time credit. An inmate who protested such penalties risked being shackled to his cell bars. Bureau of Prisons, *Thirty Years of Prison Progress* 4–5 (1961).

The Bureau of Prisons, like many state penal systems, soon decided that its chief mission was to protect the public, and that protection could best be achieved by offering rehabilitation opportunities to inmates. Carlson, *The Federal Prison System: Forty-five Years of Change,* Federal Probation 38 (June 1975). Conditions within prisons began to change for the better,

sweeping changes have been effectuated, and further experimentation and change is contemplated.

The federal prison system now maintains 50 correctional institutions, including reformatories, open camps, youth institutions, a medical center and 16 half-way houses. Rehabilitation is still the major goal of federal institutions (*id.* at 38–39). Institutional discipline no longer serves only the narrow purposes of maintaining order within the prison. It also serves the larger goals of the institution as a whole and has a role in helping the inmate to achieve self-reliance, self-control, self-respect, and self-discipline. See Eysenck, *supra,* at 144–161.

It is now widely agreed by correctional authorities (American Correction Association, *Manual of Correctional Standards,* ch. 24.7), that——

> [d]iscipline * * * looks beyond the limits of the inmate's term of confinement. It must seek to insure carry-over value by inculcating standards which the inmate will maintain after release. It must always be objective and must develop in the inmate personal responsibility to that social community to which he will return.

In its broadest sense, modern prison discipline is not an aberration from the constructive program of the institution but an integral part of it. See Taft & England, *supra,* at 427; Richmond, *Prisoner Management and Control* 14 (1969).[11]

[11] It has been said that "[t]he administrative manipulation of rewards, favors, privileges and punishments with a view to promoting changes in value identification" is "a central admin-

Many prison authorities believe that the disciplinary process loses much if not most of its value if it acquires excessive formalism. Procedural and adversarial trappings may alienate the inmate from the staff and from his fellow inmates and prevent the disciplinary process from fostering in him a clear regret for having committed the offense. In establishing and modifying a disciplinary system, prison officials believe they must tread a difficult middle ground between procedures and programs that may be so strict as to be unfair and thereby counter-productive and those that do not embody sufficient control to achieve their ends. See Taft & England, *supra,* at 428. In articulating the need to maintain this delicate balance, one experienced prison official has observed.

> The evil effects of harsh discipline are readily recognized. Brutal punishments have been tried and found wanting. Lax discipline can be equally injurious to the morale of the prisoners and even more injurious to the maintenance of security and good order. The prisoner frequently has the same Beccarian concepts of punishment as the layman in a free society [referring to the utilitarian philosophy of Beccaria, the eighteenth century Italian criminologist]. The prisoner who wants to do his time and get it over with has little liking for a prison where he can find no sense of direction in a maze of favoritism, prison politics, variable rules, indefinite procedures in

istrative objective" in obtaining a shift in the inmate's value orientation. Ohlin, *Modification of the Criminal Value System,* in *The Sociology of Punishment and Correction* 179 (Johnson ed. 1962).

> discipline, and the hypocrisies that underlie weak administration. [McKendrick, *Custody and Discipline,* in *Contemporary Correction* 169 (Tappan ed. 1951).][12]

The prison discipline process has also been said to involve other important practical considerations—including the need for correctional officials to sustain their authority and the need in many cases for quick and simple decisional procedures[13]—which this Court has found to militate against the application of the full panoply of due process protections that are required in some non-prison contexts. *Wolff, supra,* 418 U.S. at 563. See also, President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 12–13 (1967).

To reconcile these interests, many correctional systems, including the Bureau of Prisons, have adopted

[12] While some commentators attribute prison riots and disorders to "repressive" disciplinary practices and other abuses, research indicates that in many instances these problems stem instead from administrative weakness. As Professor Tappan has noted:

"It is only too clear that appeasement of rioting inmates in some penal institutions has stimulated riots in others. The discovery that threats, violence, and destruction may gain concessions has had anomalous consequences. Riots have produced some changes in prison programs and, incidentally, have provided a fictitious color of accuracy to the contention that abusive conditions incited the riots." (Tappan, *Crime, Justice and Correction* 701–702, n. 68 (1960)).

[13] Many behavioral scientists have emphasized that discipline generally should closely follow the violation if it is to be effective in behavior modification. See generally Bandora, *Principles of Behavior Modification* (1967); Krasner & Ullman, *Research in Behavior Modification* (1965); Skinner, *Science and Human Behavior* (1953).

flexible hearing procedures more informal in significant respects than those of a criminal trial. These procedures represent an effort to balance important and to some extent conflicting goals: on the one hand, the need for expeditious and non-inflammatory resolution of misconduct reports; on the other, the goal of reducing the risk of unfair, arbitrary, or factually unfounded disciplinary action."[14]

In view of the emphasis placed in prison discipline on rehabilitation and adjustment of the inmate's attitudes, the attendant value of promptness in the imposition of disciplinary action and flexibility in its selection, and the likelihood that direct, adversarial confrontations will seriously interfere with the rehabilitative process, there are substantial considerations that weigh against increasing the number of procedural requirements beyond those found sufficient by this Court in *Wolff*.

C. THE ADDITIONAL PROCEDURES HELD TO BE REQUIRED BY THE COURTS OF APPEALS WOULD IMPAIR PRISON SECURITY AND CHANGE THE NATURE OF THE DISCIPLINARY PROCESS

The effect of procedures required by the courts below—confrontation of witnesses, decisions based solely

[14] Flexibility in approach and procedures is a key element in the correctional context. As one observer has noted:
"Objectionable behavior by men in prison is so diverse that no set of rules could encompass it without being long, complex, and difficult to apply, or so arbitrary that it would arouse resentment by dealing similarly with highly diverse acts. It follows that strain in inmate-staff relationships is minimized by a policy of flexible rules interpreted to fit each case which takes into account primarily the effect of each penalty on the future behavior of the offender." (Glaser, *The Effectiveness of a Prison and Parole System* 120–121 (1969).)

on evidence introduced at the disciplinary hearing, and injection of *Miranda*-like warnings and a right to counsel—will be to convert prison disciplinary proceedings into mini-trials. If this Court upholds those requirements, it will become difficult if not impossible to preserve the rehabilitative focus of such proceedings; furthermore, the requirements might seriously impede the important function of maintaining order and protecting the safety and welfare of both inmates and staff.

1. *Confrontation and cross-examination*

Wolff observed that confrontation and cross-examination of witnesses could create a grave threat of institutional disruption (418 U.S. 567–568) and concluded that "[t]he better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons" (*id.* at 569).

The approach of *Wolff* serves not only to protect witnesses from reprisals, but also to minimize the frequency of confrontations between inmate and staff or among inmates. Based on their experience, prison officials believe that such confrontations not only interfere with the rehabilitative process but also are likely to result in increased tension and hostility between those involved, which might lead to further misconduct, possibly of a more serious nature. Moreover, confrontations could have undesirable secondary consequences; for example, a presumptive right to confront and cross-examine almost certainly would dis-

courage inmates from reporting disciplinary infractions to prison authorities lest they be revealed as violators of the "inmate code" (see p. 28, *supra*). Such deterrence to reporting would prevent the needed imposition of discipline in many situations and could measurably contribute to a decline in the security of inmates.

Clutchette respected the form, but not the substance, of these considerations and of this Court's holding in *Wolff*. While it recognized that *Wolff* had left the provision of confrontation and cross-examination to the discretion of prison officials, it sharply limited (if it did not abolish) the right of those officials to exercise that discretion. The court of appeals held that there is a presumption in favor of confrontation and cross-examination, a presumption that can be rebutted only if prison officials make a written explanation "setting forth reasons," which in turn are limited to "reprisals, unmanageability, disruption, [and] safety of prison personnel" (Pet No. 74–1194 App. v). The court of appeals did not explain why it is incumbent upon prison officials to rebut in detail a presumption in favor of confrontation and cross-examination if, as *Wolff* held, confrontation and cross-examination in a prison setting is ordinarily undesirable.

Clutchette has placed confrontation into the position *Wolff* reserved for the inmate's presumptive right to call his own witnesses and present documentary evidence (418 U.S. at 566–567). *Wolff* went on to hold, however, that confrontation should be governed by different rules. We submit that, in light of the substantial interests that would be jeopardized by making confrontations with prison officials and fellow inmates a routine matter, there should be a presumption against, not in favor of, confrontation; if that is the presumption, it ordinarily should not be necessary for prison officials to explain their reasons for withholding those procedures.

If it is ever incumbent upon prison officials to explain their actions in denying confrontation and cross-examination, we submit that this simply cannot be accomplished (nor does the Constitution require that it be accomplished) in the manner prescribed by *Clutchette*. The court of appeals required prison officials to articulate one of four enumerated reasons in each particular case. The court's list of permissible reasons is far too short, for many other concerns, such as prevention of increased hostility among inmates or between inmates and guards, and the preservation of proper rehabilitative conditions, are implicated in decisions of this sort.

Perhaps even more significant, however, is the fact that many of the possible outcomes of confrontation that the court of appeals accepts as good reasons for limiting the practice are, in the real world, no more than projections of probabilistic events. They cannot be forecast in advance as to any particular case. For example, while prison officials may know that one of every ten inmate-inmate confrontations will lead to violence, they cannot know in advance which of the ten confrontations that will be. If the officials are relegated to bypassing confrontation and cross-exami-

nation only when they have proof that a particular confrontation poses extraordinary risks, then they will be obliged to allow confrontation and cross-examination as a matter of course, incurring all of the costs that entails. On the other hand, if the officials can decline to allow confrontation simply by reciting the general probability of risks, then there is no point in requiring the recitation, for it will apply equally to most cases. In other words, the reasons for declining to permit confrontation and cross-examination apply to the disciplinary process as a whole and not, as the court of appeals supposed, apply atomistically to individual hearings.

Finally, the court of appeals seems to have invited continued judicial scrutiny of the entire disciplinary process, not only of the general outlines of procedures used in disciplinary hearings but also of each hearing itself and even of each decision in each proceeding. Thus, it has stated that failure to supply "satisfactory" reasons for denying confrontation "can be called to the attention * * * of the courts" (Pet. No. 74–1194 App. v). We find it hard to imagine a development that could be more detrimental to the salutary purposes served by prison discipline than to hold out the possibility that the disciplinary hearing is simply the opening phase of a protracted legal war that does not become final until each decision has been considered by two federal courts and certiorari has been denied. The court of appeals has turned *Wolff* on its head.

2. Use of evidence not introduced at the disciplinary hearing

Many of the considerations we have outlined above apply as well to the holding of *Clutchette* (497 F. 2d at 820) that "the disciplinary committee must be required to make its fact finding determinations based solely upon the evidence presented at the hearing." The court of appeals advanced but a single reason for imposing this requirement—that it is necessary "[f]or the right to confront and cross-examine adverse witnesses to be meaningful" (*ibid.*). The court's conclusion should fall with its premise, for we have argued that *Wolff* correctly held that there is no general right to confrontation and cross-examination.

Moreover, we submit that there are strong reasons for permitting prison administrators to rely, on occasion, upon evidence outside the record of the hearing. In some cases it may be necessary to withhold particular items of evidence in order to protect other inmates from reprisals; in other cases, presentation of all of the evidence available to prison officials could unduly prolong a hearing and make it resemble, all too closely, a "trial"; finally, in some cases supplemental or confirmatory evidence may come to the attention of prison officials only after the disciplinary hearing has been completed. The major purpose of holding hearings and allowing the inmate to be present is to inform the inmate of what is happening to him, and why, and to allow him (if he chooses) to present

his side of the story. See generally Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267 (1975). None of these interests is furthered by prohibiting use of extra-record evidence, unless the withholding of evidence is so extensive that it undermines the inmate's ability to understand the nature of the infraction he is alleged to have committed and impairs his ability to respond to the allegations. Once evidence sufficient to meet those needs has been presented, the Due Process Clause does not require more.

3. The right to counsel

Wolff rather clearly held that the Due Process Clause does not require counsel at disciplinary proceedings. The Court recognized that counsel, even more than confrontation and cross-examination, would inevitably alter the nature of the proceedings and reduce, if not eliminate, the usefulness of discipline as an instrument of rehabilitation.

Gagnon v. *Scarpelli, supra,* 411 U.S. at 790, held that "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most [parole and probation] revocation hearings * * *." The Court observed (*id.* at 787–788):

> If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body

> itself, aptly described in *Morrissey* as being "predictive and discretionary" as well as fact-finding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.

Wolff held that such considerations are "even more pertinent" (418 U.S. at 569) in prison disciplinary proceedings, in which the prisoner has a significantly lesser interest at stake than does a parolee or probationer facing revocation.

Apart from the inevitable transformation in the nature of the proceedings and their loss of utility as means to further correctional goals (*id.* at 570), a requirement of counsel will also introduce a significant element of delay. Prisons are frequently in isolated locations far from ready access to counsel. Counsel would have to be engaged, travel to the prison to consult with the inmate, prepare for the hearing, and so on. A requirement of counsel, whether retained or provided by the government, therefore would lead to delays over and above the delays that probably would result from actions taken by counsel during the hearings and from the generally increased formality of the proceedings.

The Bureau of Prisons believes that delay in the imposition of discipline is undesirable: it detracts from the efficacy of the action ultimately taken.

The balance has been struck against participation by counsel largely because of this Court's assessment that the potential gain in accuracy of fact-finding is outweighed by other important and legitimate considerations. These concerns prompted this Court to hold that inmates have no right to either retained or appointed counsel in disciplinary proceedings. *Wolff, supra,* 418 U.S. at 570.

In spite of *Wolff's* holding, and in spite of the weighty arguments that counsel would be positively detrimental to the disciplinary process, both courts of appeals have required counsel, "not because *Wolff* requires it * * * but because *Miranda* requires it in light of future criminal prosecution" (Pet. No. 74–1187 App. 14). We submit that the courts' reliance upon *Miranda* v. *Arizona,* 384 U.S. 436, and *Mathis* v. *United States,* 391 U.S. 1, as sources of a constitutional right to counsel in disciplinary proceedings misapprehends both the nature of disciplinary proceedings and the holdings of those cases.[15]

[15] *Palmigiano* suggests that "in cases where criminal charges are a realistic possibility, prison authorities *should consider* whether defense counsel, if requested, should not be let into the disciplinary hearing" (Pet. No. 74–1187 App. 14; emphasis added). In our view, this does not constitutionally require that the State allow counsel into the disciplinary hearing but simply indicates that prison officials, in the exercise of their discretion, may choose to permit the inmate to be represented by counsel. However, as even this limited holding is premised on *Miranda*, we join the State in opposition to it.

Cluchette held that the right to counsel attaches "when a prisoner 'is required to appear before a prison disciplinary committee for violation of a prison rule which *may* also be punishable by state authorities'" (510 F. 2d at 616; emphasis added). Theoretically, a substantial majority of disciplinary proceedings *may* also be punishable by criminal prosecution. As a realistic matter, however, criminal charges are brought only in those relatively few cases in which the inmate's conduct involves a serious offense. Such infractions as possession of a weapon or destruction of prison property are criminal offenses (18 U.S.C. 1361, 1792), but rarely are they the subject of criminal prosecution.

When criminal prosecution is contemplated, the Bureau of Prisons holds disciplinary proceedings briefly in abeyance until the Federal Bureau of Investigation has questioned the inmate; further delay can be requested by prosecutorial officials. Statements of the inmate during the hearings are almost never used in any criminal prosecution against him. However, if the *Cluchette* holding is permitted to stand, prison officials would be required to provide the opportunity for counsel in each of the instances, since virtually every infraction *may* be the subject of criminal prosecution.

"Custodial interrogation" is the *sine qua non* for the applicability of *Miranda. Miranda* exhaustively analyzed all of the aspects of such interrogation that might lead individuals to surrender their privilege against self-incrimination; it discussed the effects of isolation, incommunicado interrogation, exhaustion, implicit threats, and so on. These circumstances are simply not present in prison disciplinary hearings. A federal disciplinary hearing is not "interrogation." An inmate is advised of the charges against him and asked whether he desires to respond. He may or may not choose to offer an explanation or make a statement, but he is

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not compelled to respond or instructed to speak. No adverse inferences are drawn if he remains silent."[16] Indeed, current federal regulations provide that the inmate's entire presentation may be conducted by the counsel-substitute to which he is entitled; the counsel-substitute can present the inmate's statement for him and introduce the inmate's evidence in defense, mitigation, or extenuation. We submit that this procedure does not involve the sort of "interrogation" to which *Miranda* was addressed.

Even if the disciplinary hearing is "interrogation" in some sense, it is not "custodial" interrogation. We do not contend that a prison inmate is not in "custody" within the meaning of *Miranda* and *Mathis*. We do submit, however, that the custody imposed by everyday prison life does not extend to presence at the disciplinary hearing; the inmate has a right but not an obligation to attend the hearing. If the inmate decides to attend the hearing, he is free to depart. What is more, the "custody" of the hearing, if there is any, is quite different from the closed and incommunicado interrogations presented in *Miranda* and *Mathis*. As *Miranda* observed, the danger of compulsion during custodial interrogation arises principally from the fact that the interrogation takes place in private (384 U.S. at 449). Privacy is "essential to prevent distraction and to deprive [a suspect] of any

[16] *Palmigiano* involved a case in which the inmate was told that his silence would be used against him. We discuss this at pages 48–51, *infra*. The court of appeals did not limit its right to counsel to such cases, however, nor did *Cluchette*, in which no adverse inference was drawn from silence.

outside support" (*id.* at 455). Once in private, the police can "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights" (*ibid.*). Privacy also permits the police to resort to "third degree" tactics, subjecting the suspect to mental or physical exhaustion by repeated questioning. It is therefore not surprising that *Miranda* recognized (*id.* at 461) that "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."

The prison disciplinary hearing, far from being a private and incommunicado interrogation, is an open hearing presided over by an impartial panel and attended by witnesses and counsel-substitute of the inmate's choice. A record often is kept of the proceedings. Accordingly, even if he desired to do so, there is little likelihood that an individual panel member could resort to the coercive tactics open to police during stationhouse interrogation. If such tactics are employed, they will be detected; there is no "gap in [judicial] knowledge as to what in fact goes on in the interrogation rooms" (*Miranda, supra,* 384 U.S. at 448). We submit that the prison disciplinary hearings is not subject to the abuse and coercion interest in stationhouse interrogation; accordingly, there is no constitutional right to counsel to guard against such abuses.

Should the Court disagree with our analysis to this point, however, it still does not follow that counsel is

required in prison disciplinary hearings. The *Miranda* warnings are prophylactic tools designed to guard against the possibility that a suspect may be tricked or coerced into surrendering his Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to counsel at "critical stages" of the proceedings against him. See *Michigan* v. *Tucker,* 417 U.S. 433, 446. *Miranda* itself establishes a rule of evidence: statements given during custodial interrogation without the assistance of counsel, and without advice that a suspect is entitled to counsel, are not admissible in evidence in a criminal prosecution. The rule has nothing whatever to do with the procedures officials ought to use in conducting disciplinary hearings. As Judge Lumbard wrote, concurring in *Inmates of Attica Correctional Facility* v. *Rockefeller,* 453 F. 2d 12, 25 (C.A. 2):

> Neither *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), nor any other decision of the Supreme Court, or of this court, holds that the state must conduct its investigation in any particular way or that certain warnings must be given to any or all persons who may be interrogated by those investigating crimes which were or may have been committed at Attica. All that *Miranda* holds is that a defendant's statement may not be used against him in a criminal prosecution or otherwise unless he has first been given certain warnings and he has knowingly elected to speak with or without advice of counsel. A conviction will not stand if it has been obtained through the use at trial of a statement made by a defendant

> who has not been warned substantially as *Miranda* specifies. *Miranda* is a rule of evidence.

See also *Chavez-Raya* v. *Immigration and Naturalization Service,* C.A. 7, No. 74–1482, decided July 16, 1975, in which the court held that *Miranda* warnings are not required in immigration proceedings, even though the custodial interrogation may lead to criminal prosecution as well as to deportation. The court held that the individual's statements could be used against him and could lead to his deportation; the only remedy would be exclusion when, if ever, they were offered against him in a criminal case.

Miranda's prophylactic devices guard against deprivation of underlying rights—underlying rights that are intrinsic to the criminal process but not to prison discipline. As *Wolff* held, there is no underlying right to counsel, so that it is not possible to contend that counsel is required at the hearing in order to guard against loss of that right through coercion or trickery. Cf. *Kirby* v. *Illinois,* 406 U.S. 682. Moreover, because "[p]rison disciplinary proceedings are not part of a criminal prosecution" (*Wolff, supra,* 418 U.S. at 556), the Fifth Amendment privilege against self-incrimination does not apply directly, but only insofar as statements made by the inmate might be relevant to some future criminal case against him.

Both courts of appeals appear to have recognized these arguments, for they held that counsel is necessary only when an inmate might be liable to subsequent criminal prosecution for his infractions of prison rules. But if the courts simply are seeking to

protect rights in potential future prosecutions, it should follow that the prison discipline can be imposed whether or not the inmate could conceivably be criminally prosecuted. To the extent the right to counsel is extended as a prophylaxis to underlying constitutional rights, it does not apply to disciplinary hearings because there are no relevant underlying rights to safeguard. To the extent the right to counsel is extended as a prophylaxis to rights at future criminal cases, the courts of appeals have selected the improper remedy. They should hold not that the imposition of prison discipline in the absence of counsel is improper, but that any statements made by the inmate in the absense of *Miranda* warnings are inadmissible in evidence at a subsequent trial.

In short, the courts below have engrafted on the disciplinary proceeding a requirement of counsel—"not [itself] ~~practiced~~ protected by the Constitution" *Tucker, supra,* 417 U.S. at 444)—which is likely to delay proceedings and diminish or destroy the usefulness of discipline as part of a program of behavioral modification. The *Miranda* Court did not intend to create "a constitutional straitjacket" (384 U.S. at 467) to be applied across the board to every conceivable form of official hearing. Counsel has no place in a prison disciplinary proceeding.

4. *The "right to silence" and "use immunity"*

Both courts of appeals have held that there is a "right to silence" during the disciplinary proceedings. *Palmigiano* also stated that if an inmate is advised

that his silence will be held against him, any subsequent statements he may make are "coerced" and cannot be used in a subsequent criminal proceeding. Cf. *Lefkowitz* v. *Turley,* 414 U.S. 70.

We do not address these questions in detail, for an inmate attending a federal disciplinary proceeding need not speak, and, if he does not speak, no adverse inferences are drawn. However, we do not concede that these procedures are required as a matter of constitutional law. For the reasons we have advanced in the previous section, no right to silence was created by *Miranda.* Such a right would have to have its roots directly in that portion of the Fifth Amendment that states that no man shall be compelled in any criminal case to be a witness against himself. *Wolff* held (418 U.S. at 556) that disciplinary hearings are not part of a criminal prosecution." The inmate cannot, therefore, claim an absolute right to be silent. His right is coextensive with that of any party in a civil proceeding: he has a right not to give evidence that will incriminate him or form a link in a chain of incriminating evidence, unless that right is extinguished by a grant of "use immunity."

" Otherwise it would not be possible to justify this Court's holdings that there is no right to counsel or to confront and cross-examine one's accusers. It is true that discipline may involve loss of good time, and therefore additional incarceration; this surely is a sufficiently strong interest to invoke many of the protections that the criminal process employs to safeguard an individual against the risk of error or arbitrary treatment. But it does not make the proceedings "criminal," and the privilege against self-incrimination applies directly only to "criminal" cases.

We see no constitutional bar to questioning an inmate about his actions; if he invokes his privilege in response, it should be permissible to draw whatever inference may be proper in civil proceedings. Although this Court has held that no inference can be drawn from failure to testify in criminal trials (*Griffin* v. *California,* 380 U.S. 609), it has not extended that rule to civil cases. In a deportation proceeding, for example, even though the stakes are high, the individual can be questioned and informed that, if he declines to testify, adverse inferences will be drawn. *United States ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149, 153–154 (Brandeis, J.). The inference from silence cannot by itself justify deportation (*Gastelum-Quinones* v. *Kennedy,* 374 U.S. 469), but it can be given whatever probative weight it reasonably carries in the circumstances.

Finally, because disciplinary proceedings are civil in nature, the inmate has no "presumption of innocence." After prison officials have satisfied themselves that the weight of the evidence against the inmate justifies a belief that he has committed the infraction charged, the Constitution would not prevent them from taking disciplinary action (on the basis of this "*prima facie* case") unless the inmate convinces them that the facts are otherwise. Although this would exert substantial pressure on the inmate to come forward with evidence (including his own testimony), it would not be unconstitutional. Cf. *McGautha* v. *California,* 402 U.S. 183; *Flint* v. *Mullen,* 499 F. 2d 100 (C.A. 1), certiorari denied, 419 U.S. 1026. The procedure would

be objectionable only if the officials imposed some additional disability upon the inmate, in effect increasing the stakes of the hearing. See *Lefkowitz, supra* (loss of government contracts). But even so, *Gardner* v. *Broderick,* 392 U.S. 273, held that a policeman could be discharged for refusing to answer questions about his employment; he could not be compelled to surrender his privilege against self-incrimination in any criminal case, but some appropriate civil consequences could attach when a person declines to speak. We submit that an inmate can be offered the choice between speaking and remaining silent in a disciplinary hearing, and that the Constitution permits prison authorities to inform him that, if he chooses the latter course, such inferences as are reasonably appropriate under the circumstances will be drawn.

5. Prison officials should be allowed to engage in continuing development of their procedures

In the last analysis, the question of procedural requirements for the administration of prison discipline is, we respectfully submit, one that courts should approach with a full awareness of its complexity and with a sober appreciation of the limitations (given the present state of knowledge on the subject) that exist on the ability of the judiciary to supply detailed and immutable solutions at this time. As the Second Circuit observed in *Sostre* v. *McGinnis,* 442 F. 2d 178, 197, footnote omitted:

> It would be too simplistic to dissociate the impact of punishment meted out after a disciplinary hearing from the method by which the

hearing itself is conducted. As one court has observed: "The association between men in correction institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings." *Edwards* v. *Sard*, 250 F. Supp. 977, 981 (D.D.C. 1966). It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships among prisoners and prison officials. * * * We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

> We are particularly unwilling to interfere with state administrative processes when reliable, detailed information or empirical studies are as scanty as they are on the subject of prison disciplinary procedures.

The Bureau of Prisons, like other prison systems, has been engaged in a careful but steady development of procedures, adding those that experience shows will be beneficial to the prisoner yet consistent with the unique demands of the prison environment and the purposes of prison discipline, while discarding those

that prove less successful.[18] This developmental process, reflecting experience with prior changes, evolving public policy towards prisons, and expanding knowledge of the social dynamics of the prison community, ought not be rigidly circumscribed by inflexible procedural requirements imposed as a matter of unchanging constitutional law. *Wolff* well understood this delicate process, and the 14 months that have passed since it was handed down have not seen proof that its carefully balanced rules afford illusory or inadequate safeguards for the legitimate interests of prisoners. This is not the right time to replace the careful development of procedures with a fixed constellation of constitutional rules.

[18] We believe that there are likely to be special problems attendant upon overly rapid introduction of change into the prison environment. The maintenance of good order and the security of staff and inmates alike in a frequently hostile prison environment depend substantially on the existence of rules of conduct and established procedures for the prison, as well as on physical means such as walls and locks. Prison staff members often prefer that strict rules be maintained and enforced and may tend to feel threatened and weakened by changes in prison rules that appear to favor the prisoners. Prisoners, on the other hand, may feel that, once a rule has been changed in a way they perceive as favorable, the new rule is a matter of right, the revocation or alteration of which is likely to engender new hostilities. While neither of these opposing considerations should be the exclusive determinant of whether rules should be changed, they both caution against unduly frequent and possibly temporary or experimental changes in prison rules. It is the view of the Bureau of Prisons that significant changes in such rules should be preceded by careful consideration of the ramifications for all aspects of the unique prison environment, and that experimental changes, if necessary, should be made on a limited basis before being widely applied to all of the varied prison settings.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals should be vacated and the cases remanded with directions to modify the judgments in accordance with this Court's opinion.

Respectfully submitted.

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APPENDIX A

SUMMARY OF BUREAU OF PRISONS' DISCIPLINARY PROCEDURES

The objectives of inmate discipline, as stated in the Bureau of Prisons' most recent policy statement (7400.5D, issued July 7, 1975), are "to assure that inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the program, behavior standards, and limitations necessarily imposed by the administration; (b) the general welfare and safety of the institutional community; and, (c) the incorporation of due process standards for inmate disciplinary hearings as prescribed by the Supreme Court in *Wolff* v. *McDonnell,* 418 .U.S. 528."[1] (The complete text of Policy Statement 7400.5D is reproduced as Appendix B).

[1]In regard to the last of these objectives, the Director of the Bureau of Prisons stated in issuing these policies:

"While the Supreme Court in *Wolff* v. *McDonnell* has not required the presence of attorneys nor confrontation and cross-examination at prison disciplinary hearings, it emphasized that the procedures now required for disciplinary hearings are 'not graven in stone.' Likewise, this policy statement may be subject to change upon further reflection of actual practice. Clearly then, the manner in which we implement this policy will determine whether the Court sees fit to impose stricter standards in the future. While we must be greatly concerned about the security of our institutions, we must also be genuinely concerned about the fairness of our discipline system. Your efforts toward these objectives are essential." (Bureau of Prisons, Operations Memorandum 7400.14, "Inmate Discipline" (October 4, 1974).)

complete text of Policy Statement 7400.5D is reproduced as Appendix B).

The purposes, in turn, give rise to a number of "general principles" by which the disciplinary system is to be governed,[2] in recognition of the fact that "[d]isciplinary action is but one factor in correctional treatment and control" and that as applied to an inmate who has misbehaved, the objective is his "future voluntary acceptance of institutional regulations which are required for the general welfare of the institution community and serve as an aid to law-abiding behavior following release" (app. B, *infra,* p. 61).

1. CURRENT DISCIPLINARY PROCEDURES FOR MINOR DISPOSITIONS

The chief executive officer of each institution delegates to a selected committee (sometimes referred to as Treatment Team or Unit Management Team) the authority to impose minor dispositions and sanctions for violations of institutional rules and regulations.

An inmate charged with misconduct is advised in

[2] These principles are as follows (App. B, *infra*, at pp. 63–64):

(a) Disciplinary action shall be taken at such times and in such measures and degree as is necessary to regulate an inmate's behavior within acceptable limits;

(b) Inmate behavior shall be controlled in a completely impartial and consistent manner;

(c) Disciplinary action shall not be capricious, retaliatory, or for the purpose of revenge;

(d) Corporal punishment of any kind is strictly prohibited; and

(e) Accurate, detailed reports of disciplinary actions shall be maintained in accordance with the requirements of this policy statement.

writing of the charge[3] within twenty-four hours of the infraction and is given an opportunity to state his version of the incident. The inmate is entitled to a hearing before the committee (of which neither the reporting nor investigating officer shall be a member) within forty-eight hours of the incident. He is again advised of the charges and afforded the opportunity to make a statement and present documentary evidence in his behalf. The committee's report, a copy of which is provided the inmate, must clearly state the basis for the decision and the disposition.

The committee can take any of a number of steps. It may exonerate the inmate (the report of misconduct is expunged from the inmate's file); refer him to various institutional programs and service resources; reprimand him; subject him to certain restrictions; withdraw certain privileges; remove him from certain programs, job assignments, or quarters; or recommend that the charges be referred to the Institution Discipline Committee, which has authority to impose a broader range of sanctions.

2. CURRENT PROCEDURES FOR IMPOSITION OF SERIOUS SANCTIONS

In cases where forfeiture or withholding of good time credits, transfer for disciplinary reasons, discipli-

[3] The policy statement includes sections which set forth the rights and responsibilities of federal inmates and a list of prohibited acts. App. B, *infra* pp. 64–67. At the time of his arrival at the institution, the prisoner is advised in writing what acts are prohibited and of the types of disciplinary action that may be taken.

nary segregation, or recommendations to the Board of Parole for recession or retardation of parole grants may be appropriate, the matter is referred to the Institution Discipline Committee. The Committee includes no fewer than three members and shall not include either the reporting or the investigating officer.[4]

The inmate is given advance written notice of charges against him no less than twenty-four hours before his appearance before the Institution Discipline Committee. He is advised that he can have a staff member represent him at the hearing. The staff member will be available to assist the inmate in speaking with witnesses, presenting favorable evidence on the merits of the charges, and in presenting evidence in extenuation or mitigation. The inmate is permitted to call witnesses and present documentary evidence. Reasons for declining to call requested witnesses must be documented in the Committee's report. The Institution Discipline Committee prepares a record of the proceedings which, although not verbatim, will include the inmate's advice of his rights, the Committee's finding, its decision, the specific evidence relied on by the Committee and a brief statement of the reasons for the sanctions imposed. The inmate is advised that he can appeal the Committee's decision to the Chief Executive Officer of the institution within thirty days.

[4] The policy statement provides that a staff member witnessing the incident may sit as a member of the Committee in those few situations in which the misconduct was such that virtually every staff member witnessed it in whole or part. App. B, *infra*, p. 73.

CURRENT PROCEDURES FOR APPEAL FROM DISCIPLINARY ACTION

The inmate can appeal the imposition of any disciplinary sanction to the Chief Executive Officer of the institution. That officer may approve, modify or reverse any disciplinary action taken; however, he can not increase the sanction imposed. Upon administrative review, consideration is given to whether (1) there has been compliance with the procedural requirements; (2) the decision has a substantial factual basis; and (3) the sanction imposed was disproportionate to offense.

The inmate can also seek review by the Regional Director. Bureau of Prisons, Policy Statement 2001.6A, "Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities," issued February 14, 1974.[5] Adverse decisions of the Regional Directors can be appealed to the Bureau of Prisons' General Counsel.

[5] An inmate's recourse to administrative review is not limited to adverse disciplinary actions, but is open to all inmate grievances. Based on successful operation of a program instituted on a pilot basis in three institutions, this program became effective in all federal institutions on April 1, 1974. It is our hope that such a procedure may not only reduce the burden imposed on federal courts by suits reflecting inmate grievances, but also may reduce the frequency and intensity of inmate-staff confrontations and attendant inmate misconduct, thereby reducing the number of occasions requiring disciplinary action.

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APPENDIX B

Bureau of Prisons Policy Statement No. 7400.5D, dated July 7, 1975, and establishing the Bureau's disciplinary procedures, provides:

1. PURPOSE

This statement of policy is to assure that inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the program, behavior standards, and limitations necessarily imposed by the administration; (b) the general welfare and safety of the institutional community; and, (c) the incorporation of due process standards for inmate disciplinary hearings as prescribed by the Supreme Court in *Wolff* v. *McDonnell*, 418 U.S. 528, 94 S. Ct. 2963, 41 L. Ed 2d 935 (1974).

2. DIRECTIVES AFFECTED

Policy Statements 7400.5C and 7400.6A are superseded.

3. POLICY

It is the policy of the Federal Bureau of Prisons to maintain an institutional climate in all of its facilities so that every inmate may complete his term of confinement with a minimum of corrosive effect and a maximum gain in his ability to more adequately main-

tain a successful community adjustment following release. In order that the majority of inmates might live in a safe and orderly environment, it is necessary that those individuals whose behavior is in noncompliance with institution rules be brought to the attention of the appropriate authorities.

Disciplinary action is but one factor in correctional treatment and control. There are other individualized correctional programs and goals that shall be given consideration by the administration. The objective of this approach is the future voluntary acceptance of institution regulations which are required for the general welfare of the institution community and serve as an aid to law-abiding behavior following release.

4. ACTION

A single Institution Discipline Committee will be established in each Bureau of Prisons Institution. In the event of a serious *disturbance or other emergency, or if an offense is committed in the presence of the Committee, the Chief Executive Officer may establish more than one Institution Discipline Committee with approval of the appropriate Regional Director. The Committee will be composed of at least three (3) members, of whom two (2) will be of department head level or above; the Chairman will be of the level of department head or above. **This requirement as to the level of members will not apply to Community Treatment Centers or Camps.

**Exceptions to this procedure for Community Treatment Centers are noted in paragraph 13 of this Policy Statement.

*The Chief Executive Officer of each institution will delegate to the Institution Discipline Committee the authority to order an inmate placed or retained in disciplinary segregation, to order the withholding or forfeiture of good time, to order an inmate transferred for disciplinary reasons, and to make recommendations to the U.S. Board of Parole for rescission or retardation of *parole grants. The Board, however, may request the Institution Discipline Committee to hold a fact finding hearing in any case whenever the Board deems it necessary to determine whether a parole grant is to be rescinded or retarded. In study cases (4208(b), 4252, 5010(e), 5037(c) any report of disciplinary action to the sentencing judge must be preceded by a hearing in accordance with paragraph 9 of this policy statement. The authority to impose sanctions other than disciplinary segregation, withholding or forfeiture of good time, transfer for disciplinary reasons, and to make recommendations to the U.S. Board of Parole for rescission or retardation of parole grants, will be lodged in such person or persons as the Chief Executive Officer may direct. Where the institution has a unit management system, the authority to impose these lesser sanctions will be delegated to staff members in the inmate's unit.

Each institution having the need for facilities to house inmates separate from the general population will establish special housing units consisting of two types: Administrative Dentention and Disciplinary Segregation.

An inmate may be placed in Administrative Detention when his attitude and conduct indicate that his

continued presence in the general population poses a serious threat to life, property, himself, staff, other inmates or to the security of the institution, and when the inmate:

(a) Is pending a hearing for a violation of institution rules or regulations;

(b) Is pending an investigation of a violation of institution rules or regulations;

(c) Is pending investigation or trial for a criminal act;

*(d) Requests admission to Administrative Detention for his own protection or the staff determines that admission to or continuation in Administrative Detention is necessary for the inmate's own protection;

*(e) Is pending transfer or is in holdover status during transfer; or

(f) Is pending classification.

An inmate may be placed in disciplinary segregation when his continued presence in the general population poses a serious threat to himself, staff, or other inmates or to the security of the institution and when the Institution Discipline Committee directs following a hearing conducted in accordance with the limited due process requirements as outlined in paragraph 9 of this policy statement in which the inmate has been found to have committed a serious violation of institution rules or regulations.

5. GENERAL PRINCIPLES

The following general principles shall be applicable in every disciplinary action taken:

(a) Disciplinary action shall be taken at such times

and in such measures and degree as is necessary to regulate an inmate's behavior within acceptable limits;

(b) Inmate behavior shall be controlled in a completely impartial and consistent manner;

(c) Disciplinary action shall not be capricious, retaliatory, or for the purpose of revenge;

(d) Corporal punishment of any kind is strictly prohibited; and

(e) Accurate, detailed reports of disciplinary actions shall be maintained in accordance with the requirements of this policy statement.

6. INFORMATION TO INMATES

Each inmate is to be advised in writing at the time of arrival at an institution of:

(a) His rights and responsibilities;

(b) Acts prohibited in the institution;

(c) The types of disciplinary action which may be taken; and

(d) The disciplinary system within the institution.

This information will be provided in booklet or pamphlet form as part of the admission orientation program. A signed receipt will be obtained from each inmate acknowledging that he has received a copy of the booklet or pamphlet.

(e) *Rights and Responsibilities*

Rights	*Responsibilities*
1. You have the right to expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel.	1. You have the responsibility to treat others, both employees and inmates, in the same manner.
2. You have the right to be informed of the rules, procedures, and schedules concerning the operation of the institution.	2. You have the responsibility to know and abide by them.

3. You have the right to freedom of religious affiliation, and voluntary religious worship.	3. You have the responsibility to recognize and respect the rights of others in this regard.
4. You have the right to health care which includes nutritious meals, proper bedding and clothing, and a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation for warmth and fresh air, a regular exercise period, toilet articles and medical and dental treatment.	4. It is your responsibility to not waste food, to follow the laundry and shower schedule, to maintain neat and clean living quarters, and to seek medical and dental care as you may need it.
5. You have the right to visit and correspond with family members, and friends, and correspond with members of the news media in keeping with the facility rules and schedules. You also have a right to uncensored and uninspected out going correspondence with members of the news media through the Prisoners' Mail Box System. Letters forwarded to the news media through PMB are subject to the regulations of that System.	5. It is your responsibility to conduct yourself properly during visits, to not accept or pass contraband, and to not violate the law through your correspondence.
6. You have the right to unrestricted and confidential access to the courts by correspondence (on matters such as the legality of your conviction, civil matters, pending criminal cases, and to conditions of your imprisonment).	6. You have the responsibility to present honestly and fairly your petitions, questions, and problems to the court.
7. You have the right to legal counsel from an attorney of your choice by interviews and correspondence.	7. It is your responsibility to use the services of an attorney honestly and fairly.
8. You have the right to participate in the use of law library reference materials to assist you in resolving legal problems. You also have the right to receive help when it is available through a legal assistance program.	8. It is your responsibility to use these resources in keeping with the procedures and schedule prescribed and to respect the rights of other inmates to the use of the material.

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9. You have the right to a wide range of reading material for educational purposes and for your own enjoyment. These materials may include magazines and newspapers sent from the publishers.	9. It is your responsibility to seek and utilize such materials for your personal benefit, without depriving others of their equal rights to the use of this material.
10. You have the right to participate in education, vocational training, and employment as far as resources are available, and in keeping with your interests, needs, and abilities.	10. You have the responsibility to take advantage of activities which may help you live a successful and law abiding life within the institution and in the community. You will be expected to abide by the regulations governing the use of such activities.

(f) *Prohibited Acts in Federal Penal and Correctional Institutions*

001 Killing
002 Assaulting any person
003 Fighting with another person
004 Threatening another with bodily harm, or with any offense against his person or his property
005 Extortion, blackmail, protection: demanding or receiving money or any thing of value in return for protection against others, to avoid bodily harm, or under threat of informing
051 Engaging in sexual acts with others
052 Making sexual proposals or threats to another
053 Indecent exposure
101 Escape
102 Attempting or planning escape
103 Wearing a disguise or mask
151 Setting a fire
152 Destroying, altering, or damaging government property, or the property of another person
153 Stealing (theft)
154 Tampering with or blocking any locking device
155 Adulteration of any food or drink
201 Possession or introduction of an explosive or any ammunition
202 Possession or introduction of a gun, firearm, weapon, sharpened instrument, knife, or unauthorized tool
203 Possession, introduction, or use of any narcotics, narcotic paraphernalia, drugs, or intoxicants not prescribed for the individual by the medical staff
204 Misuse of authorized medication
205 Possession of money or currency, unless specifically authorized
206 Possession of property belonging to another person
207 Loaning of property or anything of value for profit or increased return

208 Possession of any thing not authorized for retention or receipt by the inmate, and not issued to him through regular institutional channels
209 Possessing any officer's or staff clothing
210 Possessing unauthorized clothing
211 Mutilating or altering clothing issued by the government
251 Rioting
252 Encouraging others to riot
253 Engaging in, or encouraging, a group demonstration
254 Refusing to work, or to accept a program assignment
255 Encouraging others to refuse to work or participate in work stoppage
256 Refusing to obey an order of any staff member
257 Violating a condition of furlough
301 Unexcused absence from work, or any assignment
302 Malingering, feigning an illness
303 Failing to perform work as instructed by a supervisor
304 Insolence towards a staff member
305 Lying or providing a false statement to a staff member
306 Conduct which disrupts or interferes with the security or orderly running of the institution
351 Counterfeiting, forging, or unauthorized reproduction of any document, article of identification, money, security, or official paper
401 Participating in an unauthorized meeting or gathering
402 Being in an unauthorized area
451 Failure to follow safety or sanitation regulations
452 Using any equipment or machinery which is not specifically authorized
453 Using any equipment or machinery contrary to instructions or posted safety standards
501 Failing to stand count
502 Interfering with the taking of count
551 Making intoxicants
552 Being intoxicated
553 Smoking where prohibited
554 Using abusive or obscene language
601 Gambling
602 Preparing or conducting a gambling pool
603 Possession of gambling paraphernalia
651 Being unsanitary or untidy: failing to keep one's person and one's quarters in accordance with posted standards
653 Tattooing or self-mutilation
701 Unauthorized use of mail or telephone
702 Unauthorized contacts with the public
703 Correspondence or conduct with a visitor in violation of posted regulations
751 Giving or offering any official or staff member a bribe, or any thing of value
752 Giving money or any thing of value to, or accepting money or any thing of value from; another inmate, a member of his family, or his friend
801 Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, and making plans to commit any of the above offenses shall be considered the same as a commission of the offense itself

7. INCIDENT REPORT AND INVESTIGATION

(a) *Incident Report:* Informal resolution of incidents involving violations of institution rules or regulations is encouraged. However, where an employee witnesses or has a reasonable belief that a violation of institution rules or regulations has been committed by an inmate, and where the employee deems that informal resolution of the incident is unwarranted, the employee shall prepare an incident report and forward it tothe appropriate correctional supervisor. The appropriate correctional supervisor may informally dispose of the incident report or forward the incident report for further disposition consistent with this policy statement.

The reporting employee should complete Part 1 of the incident report immediately. The incident is to be one of the Prohibited Acts listed in paragraph 6(f) of this policy statement. The entire language of the Prohibited Act(s) does not have to be copied. Only the relevant portion need be used. For example, "Destroying Government Property, Code No. 152", "Possessing narcotics, Code No. 801" would be acceptable listings for appropriate charges.

The description of the incident should contain the details of the activity which is being reported. All facts about the incident which are known by the employee should be recorded. If there is anything unusual about the inmate's behavior, this should be noted. The reporting employee should also list any staff or inmate witnesses to the incident, and the disposition of any physical evidence (weapons, property, and etc.) which

the employee may have personally handled. The reporting employee will sign the report and indicate his title in the appropriate blocks. The incident report should then be forwarded to the appropriate correctional supervisor for disposition.

(b) *Investigation:* The investigation should be conducted within 24 hours of appointment of the investigator, unless circumstances beyond the control of the investigator intervene. The investigating officer should ordinarily be an employee of supervisory level and may not be the employee reporting the particular incident in question. Where it appears likely that the incident may be the subject of a criminal prosecution, investigation should be suspended and the inmate should not be questioned until the FBI interviews have been completed. (See Policy Statement 2200.1.)

Ordinarily, an inmate will be given a copy of the incident report by the investigating officer at the beginning of the investigation. If the investigation is delayed for any reason, any employee may deliver the charges to the inmate. The date and time the inmate receives a copy of the Incident Report will be noted. This should be done within eight (8) hours from the time the investigator received his assignment, unless there are exceptional circumstances which prevent it. The investigator should also read the charges to the inmate and obtain his statement concerning the incident, except as provided above. Comment about the inmate's attitude may be included here.

The investigator should then thoroughly investigate the incident. He should talk to witnesses, and sum-

marize their statements. The disposition of evidence should be recorded. Often, he will want to talk to the reporting employee to obtain his report first hand and to clarify any questions the investigator may have. All steps and actions taken should be recorded on the incident report.

Under Comments and Conclusions, the investigator may include his comments on the inmate's prior record and behavior, his analysis of any conflicts between witnesses, and his conclusions of what in fact happened. The inmate does not receive a copy of the investigation. However, should the case ultimately be forwarded to the Institution Discipline Committee, the investigation should be given to the inmate's staff representative for use in presentation on the inmate's behalf.

8. MINOR DISPOSITIONS

The Chief Executive Officer of each institution shall delegate to such persons he selects the authority to impose minor dispositions and sanctions for violations of institution rules or regulations. Where the institution has a unit management system, the authority to impose minor dispositions and sanctions shall be delegated to staff members *of an inmate's unit. Minor dispositions and sanctions are those actions imposed for violation of institution rules or regulations other than segregation, withholding or forfeiture of good time, transfer for disciplinary reasons, or recommendations to the U.S. Board of Parole for rescission or retardation of parole grants. While the process by which minor dispositions are imposed is left to the

discretion of the Chief Executive Officer of each institution, the following minimum standards will apply throughout the Bureau of Prisons:

(a) Each inmate charged with violating an institution rule or regulation shall be given a written copy of the charge or charges against him within 24 hours of the infraction.

*(b) Each inmate so charged will be entitled to a hearing before someone other than the reporting or investigating officer, held within 48 hours (excluding weekends and holidays) of the incident to consider the charge brought against him.

(c) The inmate will be entitled to be present at the hearing except during deliberations of the decision maker and where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record.

(d) The inmate will be afforded the opportunity to make a statement and to present documentary evidence in his own behalf.

(e) The inmate will be given a written copy of the decision and disposition. Review of any action taken as a minor disposition will be pursuant to the Administrative Remedy Procedure, Policy Statement 2001.6A.

(f) Where an alleged violation of institution rules or regulations warrants consideration for other than minor sanction, the charge may be referred to the Institution Discipline Committee for hearing and disposition. Copies of all relevant documents should be forwarded to the Chairman of the Institution Dis-

cipline Committee with a brief statement of reasons for the referral along with any recommendations for appropriate disposition should the inmate be *found to have committed the act charged. The inmate whose charge is being referred to the Institution Discipline Committee may be retained in Adminstrative Detention or other restricted status, but should have no final disposition imposed if the matter is referred to the Institution Discipline Committee.

(g) When charges are to be referred to the Institution Discipline Committee, the inmate shall be advised of the rights afforded at a hearing before the Institution Discipline Committee. He shall be asked to indicate his choice of staff representative and the names of any witnesses he wishes to be called to testify on his behalf at the hearing. (A sample form that may be used for this purpose is attached to this policy statement.)

(h) Where the person or persons delegated the authority to impose minor dispositions determines that the inmate is innocent of committing any prohibited act, the inmate's file shall be expunged of the incident report lodged against him.

*(i) Time limits imposed in this section may be extended for good cause.

9. INSTITUTION DISCIPLINE COMMITTEE

(a) *Composition:* The Chief Executive Officer may appoint as many members to the Institution Discipline Committee as he deems appropriate. No fewer than three members, including the Chairman, must be

present at any hearing to constitute a quorum. The Chairman and no less than one member present at the hearing will be of the department head level or higher. The third member of the Committee need not be of department head level. For the purpose of this section, "department head" includes acting department head. This requirement as to the level of staff members and Chairman will not apply to Community Treatment Centers or Camps. In order to insure impartiality, a staff member may not sit as a member of the Institution Discipline Committee if he reported or investigated the incident of rules infraction being considered. Ordinarily a staff member witnessing an incident under consideration should not sit as a member of the Institution Discipline Committee. However, a staff member witnessing an incident may sit as a member of the Institution Discipline Committee where the incident is so widely witnessed that virtually every staff member has witnessed it in whole or part. Likewise, a staff member may not sit as a member of the Institution Discipline Committee if he played any significant part in having the charges referred to the Institution Discipline Committee for consideration. The Chief Executive Officer should appoint members to this Committee who are broadly representative of the primary areas of institutional administration and who are fully knowledgeable of the requirements of this policy statement and of the functions of Inmate Discipline.

(b) *Functions:* The Institution Discipline Committee shall conduct hearings, make findings, and may impose appropriate sanctions on incidents of inmate

misconduct referred to it for disposition *following a hearing as required by paragraph 8 of this policy statement before the unit or team discipline committee or other persons delegated the authority to impose minor dispositions in accordance with the due process standards as listed below. The Institution Discipline Committee may not hear any case or impose any sanctions (except as provided in paragraph 9(d)(4), continuing offenses) not heard and referred by the unit or team discipline committee or other persons delegated the authority to impose minor dispositions. Findings of the Committee that an inmate has committed a prohibited act must be based upon a substantial factual basis; i.e. based on sufficient evidence from which it can be concluded that the particular individual committed the prohibited act charged. While this Committee may impose any lesser sanctions available, only this Committee will have the authority to order: (1) an inmate placed in disciplinary segreation, (2) an inmate's good time withheld or forfeited, (3) an inmate transferred to another institution for *disciplinary reasons, or (4) to recommend to the U.S. Board of Parole that an inmate's parole grant be retarded or rescinded. This Committee will also conduct reviews of inmates placed in disciplinary segregation in accordance with requirements listed below.

(c) *Procedural Requirements:* An inmate may not be placed in disciplinary segregation, have his good time withheld or forfeited, be transferred to another institution for disciplinary reasons, or *have the Bureau recommend retardation or recission of a parole grant unless there has been a fact-finding hearing be-

fore the Institution Discipline Committee in which the following procedures have been satisfied:

(1) An inmate will be given advance written notice of the charge(s) against him no less than 24 hours before his appearance before the Institution Discipline Committee. An inmate may waive in writing this 24 hour notice requirement.

(2) An inmate will be provided the service of a full-time staff member to represent him at the hearing before the Institution Discipline Committe should he so desire. The staff *representative will be available to assist the inmate if he desires by speaking to witnesses and by presenting favorable evidence to the Committee on the merits of the charges. The staff representative will also assist in presenting evidence in extenuation or mitigation of the charges. The Chairman shall arrange for the presence of a selected staff representative. If the staff member selected declines or is unavailable because of absence from the institution, the inmate should be given the options of selecting another representative, or in the case of an absent staff member, of waiting a reasonable period for his return, or continuing the hearing without a *staff representative. Where an inmate who is illiterate requests a staff representative or where an inmate facing complex charges requests a staff representation, but staff members decline this role, the Chief Executive Officer shall appoint a staff representative to assist such inmate. A staff representative should be given adequate time to speak with the inmate and interview requested witnesses where appropriate. While it is expected that a staff member will have had ample time to prepare

prior to the hearing, delays in the hearing to allow for adequate preparation may be ordered by the Chairman of the Institution Discipline Committee.

(3) An inmate will be permitted to have witnesses called and to present documents in his behalf, provided the calling of witnesses or the disclosure of documentary evidence would not jeopardize or threaten institutional security. The Chairman will call those witnesses he deems reasonably available and necessary for an appreciation of the circumstances surrounding the charge. Repetitive witnesses need not be called. Unavailable witnesses may be asked to submit written statements. Reasons for declining to call requested witnesses will be documented in the Committee's report. Witnesses requested by the inmate who are called should be questioned by his staff representative or where staff representation has been waived, by members of the Committee. Inmates who have waived the services of a staff representative may submit questions for requested witnesses in writing to the Committee.

(4) The Institution Discipline Committee will prepare a record of its proceedings which need not be verbatim. This record must be sufficient to document the advisement of inmate rights, the Committee's findings, the Committee's decision, the specific evidence relied on by the Committee, and a brief statement of the reasons for the sanctions imposed. The evidence relied upon for the decision and the reasons for the actions taken should be set out in specific terms unless doing so would jeopardize institutional security. (A sample form that may be used to advise an inmate of

his rights at an Institution Discipline Committee hearing is attached to this policy statement.)

(5) An inmate will be permitted to be present throughout the Institution Discipline Committee hearing except during deliberations of the Committee and except where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record. A hearing may be conducted in the absence of an inmate where the inmate refuses to appear and he can not be brought to the hearing without the use of force. When an inmate escapes from custody, the Institution Discipline Committee will conduct a hearing in the inmate's absence at the institution from which the escape occurred. When an inmate who has had sanctions imposed (such as loss of good time) while absent from custody, returns to custody, he will be advised of his right to have the escape charge brought before the Institution Discipline Committee at the institution where he returned to custody. All the procedural requirements of Institutional Discipline Committee hearings will apply to this rehearing except written statements of witnesses not readily available may be liberally used instead of live witnesses. The Institution Discipline Committee, upon rehearing, may dismiss the charge, or may modify but may not increase the sanctions previously imposed in the inmate's absence.

(d) *Dispositions of the Institution Discipline Committee:* The Institution Discipline Committee shall have available a broad range of sanctions and disposi-

tions. These dispositions and sanctions will include the following:

The Institution Discipline Committee may

(1) Dismiss any charge(s) before it where appropriate and shall order the record of charges expunged where the inmate has been determined innocent of the charge(s).

(2) Impose sanctions and dispositions available to the person or persons designated to impose minor dispositions.

(3) Direct that an inmate be placed or retained in disciplinary segregation pursuant to guidelines contained in this policy statement.

(4) Direct that an inmate's good time be withheld. Withholding of good time should be limited to misconduct or offenses; it should not be applied as a universal punishment to all persons in disciplinary segregation status. Withholding shall be limited to the good time creditable for the single month during which the violation occurs. (Some offenses, such as refusal to work at an assignment, may be recurring, and thus may permit consecutive withholding actions.) With*held good time must be considered for restoration on or about six (6) months from the date of the offense which formed the basis of the withholding. Withheld good time may be considered for restoration earlier than the six (6) month date if circumstances warrant.

(5) Direct that an inmate's good time be forfeited. The good time available for forfeiture is limited to an amount computed by multiplying the number of months served at the time of the offense for which

forfeiture action is taken, by the applicable monthly rate specified in 18 United States Code, Section 4161 (less any previous forfeiture or withholding outstanding), plus extra good time which may have been earned to the date of the offense. All or part of an inmate's accumulated good time may be forfeited. Authority to restore all types of forfeited and withheld good time is delegated to the Institution Discipline Committee of each *institution. Forfeited good time must be considered for restoration on or about one (1) year from the date of the offense which formed the basis of the forfeiture. Forfeited good time may be considered for restoration earlier than the one (1) year date if circumstances warrant.

(6) Direct that an inmate be transferred to another institution for disciplinary reasons. Where a present or impending emergency requires immediate action, an inmate may be transferred prior to an Institution Discipline Committee hearing. However, a hearing before the Institution Discipline Committee at the receiving institution must be conducted as soon as practicable under the circumstances to consider the factual basis of the charge of misconduct and the reasons for the emergency transfer. Transfers for disciplinary reasons prior to a hearing before the Institution Discipline Committee are to be used only in emergency situations and only with the approval of the receiving Regional Director. However, when an inmate is transferred under these circumstances, the sending institution will forward copies of incident reports with completed investigation to the receiving institution's Institution Discipline Committee. All procedural

requirements applicable to Institution Discipline Committee hearings contained in paragraph 9(c) of this policy statement will be utilized, except written statements of unavailable witnesses may be liberally accepted instead of live testimony.

(7) Suspend the execution of any sanction it imposes.

*(8) Make recommendations to U.S. Board of Parole for retardation or rescission of parole grants and hold fact finding hearings upon request of the Board as set forth in paragraph 4 above.

(e) *Criminal Prosecutions:* Where an inmate's misconduct may also be the subject of a criminal prosecution, it is not necessary to await the outcome of the criminal trial before taking disciplinary action, especially if there is reason to believe there will be a long delay before the trial is held. An inmate under investigation of the FBI or other law enforcement officers for an offense committed in the institution may not be questioned about the charge until the FBI interviews are completed. An inmate who is the subject of criminal prosecution for institutional violations will not be transferred from the jurisdiction of the trial court without the consent of the appropriate United States Attorney or the Court in which the trial is pending.

*(f) *Expunging Records*: As set forth in paragraph 8(h) and subparagraph (d)(1) of this paragraph, an inmate's file shall be expunged of the disciplinary report against him whenever he is found not to have committed a prohibited act. The requirement for expunging the inmate's file does not preclude

maintaining copies of disciplinary actions resulting in "not guilty" findings in a master file separate from the inmate's institution file provided the contents of the master file are not used in any manner which would adversely affect the inmate. Likewise, the expungement requirement does not require the destruction of medical reports or Special Housing Report Forms relating to a particular inmate which must be maintained to document medical treatment given in a Special Housing Unit. In the situation where an inmate's conduct during one continuous incident may violate more than one prohibited act, and the incident is reported on a single Incident Report, if the inmate is found not to have committed every prohibited act charged, then the record will clearly show what violations were not proven. No further expunging is possible or necessary. The existence of charged but unproven misconduct will not be used against the inmate.

10. APPEALS FROM INSTITUTION DISCIPLINE COMMITTEE ACTIONS

At the time the Institution Discipline Committee gives an inmate notice of its decision, the Committee will also advise the inmate that he may appeal the Committee's decision to the Chief Executive Officer. Appeals must be filed no later than thirty (30) days after notice of the decision. This time limit may be extended for good cause shown. An inmate wishing to appeal any disciplinary action imposed as a result of a hearing before the Institution Discipline Committee

must use the procedures and forms provided for by Policy Statement 2001.6A (Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities). The Chief Executive Officer may approve, modify, or reverse any disciplinary action of the Institution Discipline Committee as he deems appropriate. This authority may not be delegated. The Chief Executive Officer may not increase the amount of forfeiture imposed.

An inmate may appeal an adverse decision of the Chief Executive Officer through the appeal procedures contained in Policy Statement 2001.6A to the appropriate Regional Director. Appeals to the Regional Director from adverse decisions from the Chief Executive Officer must be filed no later than thirty (30) days from the date of the Chief Executive Officer's decision.

Additionally, appeals of adverse decision from the Regional Director may be made to the Assistant Director, General Counsel and Review within thirty (30) days of the decision from the Regional Director.

On appeal the following factors will be considered:

(a) Was there substantial compliance with the Policy Statement on Inmate Discipline?

(b) Was the decision of the Institution Discipline Committee based on substantial evidence?

(c) Under the circumstances, was the sanction imposed disproportionate to the offense?

11. SPECIAL HOUSING UNITS

Each institution having the need for facilities to house inmates separate from the general population

will establish special housing units consisting of two types: Administrative Detention and Disciplinary Segregation. (Some institutions may also have a facility for long-term control unit programs—see Policy Statement 7300.80.) Special Housing Units will be maintained in accordance with the policies and procedures contained in this policy statement.

(a) *Administrative Detention:* Administrative Detention is the status of confinement which results in a loss of some privileges which the inmate would have if assigned to the general population. Administrative Detention is to be used only where the continued presence of the inmate in general population poses a serious threat of life, property, himself, other inmates, staff members or the security of the institution.

(1) *Placement in Administrative Detention:* An inmate may be placed in Administrative Detention by persons designated by the Chief Executive Officer. These persons may be correctional supervisors, shift supervisors or members of an *inmate's unit or team. An inmate may be placed in Administrative Detention when his attitude and conduct indicate that his continued presence in the general population poses a serious threat to life, property, himself, staff, other inmates or to the security of the institution, and when the inmate:

a. Is pending a hearing for a violation of institution rules or regulations;

b. Is pending an investigation of a violation of institution rules or regulations;

c. Is pending investigation or trial for a criminal act;

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*d. Requests admission to Administrative Detention for his own protection or the staff determines that admission to or continuation in Administrative Detention is necessary for the inmate's own protection;

*e. Is pending transfer or is in holdover status during transfer; or

f. Is pending classification.

A memorandum detailing the reason for placing an inmate in Administrative Detention will be prepared and given to members of the inmate's unit or team, with a copy to the Operations Supervisor of the Administrative Detention unit. A copy of this memorandum will also be given to the inmate provided institutional security is not thereby compromised.

(2) *Review of Inmates Housed in Administrative Detention:* The Chief Executive Officer shall designate such person or persons he deems appropriate to review the status of inmates housed in Administrative Detention. Normally the Operations Supervisor of the Administrative Detention unit or members of the inmate's unit or team should be delegated this authority. Initial placement shall be accomplished by means of a *memorandum detailing the reasons for this action. The reviewing authority will formally review the status of each inmate who spends seven (7) continuous days in Administrative Detention, and thereafter such cases will be reviewed on the record each week and will be formally reviewed at least every thirty (30) days. The inmate shall appear before the reviewing authority at such formal reviews unless the inmate refuses to appear without the use

of force. Administrative Detention is to be used only for short periods of time except where an inmate needs long-term protection. An inmate may be kept in Administrative Detention for longer-term protection where the need for such protection is well documented. (See P.S. 7900.51.) Inmates shall be released when the reasons for their initial placement ceases to exist or where their return to general population would no longer pose a serious threat to themselves, to staff or other inmates or the security of the *institution. (A standardized form for review is attached.)

(3) *Conditions of Administrative Detention:* The basis level of conditions as described below for Disciplinary Segregation will also apply to Administrative Detention. To the extent possible, inmates housed in Administrative Detention will be afforded the same general privileges given to inmates in general population as is consistent with existing resources available and the security needs of the unit. Unless there are compelling reasons to the contrary, institutions should provide commissary privileges, reasonable amounts of personal property, and exercise periods exceeding those provided for inmates housed in Disciplinary Segregation. Visiting and correspondence privileges of the general population should be given inmates in Administrative Detention.

*(4) *Temporary Placement in Disciplinary Segregation:* An inmate who is causing a serious disruption (threatening life or property) in Administrative Detention, who cannot be controlled within the physical confines of Administrative Detention, and who cannot be safely transferred to the institution hos-

pital, may be moved temporarily (not exceeding three (3) days) to Disciplinary Segregation pending a hearing before the Institution Disciplinary Committee. The authority to order the temporary move into Disciplinary Segregation is limited to the official in charge of the institution at the time the move is ordered. A fully documented report of every such movement shall be immediately forwarded to the appropriate Regional Director.

(d) *Disciplinary Segregation:* Disciplinary Segregation is the status of confinement of an inmate housed in an individual cell either by himself or with other inmates, separated from the general population, as a result of a hearing before the Institution Discipline Committee in which the inmate has been found to have committed a prohibited act. Inmates housed in Disciplinary Segregation will have significantly fewer privileges than those housed in Administrative Detention. Disciplinary Segregation is to be used only where other available dispositions are inadequate to regulate an inmate's behavior within acceptable limits and where the inmate's presence in the general population poses a serious threat to life, property, to himself, staff or other inmates or the security of the institution.

(1) *Placement in Disciplinary Segregation:* An inmate may be placed in Disciplinary Segregation only by direction of the Institution Discipline Committee following a hearing in which the inmate has been found to have committed a serious act of misconduct which warrants this serious sanction. Inmates found to have committed serious acts of misconduct should

not be placed in Disciplinary Segregation unless their presence in general population would pose a serious threat to staff or other inmates or to the security of the institution.

*(2) *Review of Inmates in Disciplinary Segregation:* The Institution Discipline Committee will formally review the status of each inmate who spends seven (7) continuous days in disciplinary segregation, and thereafter such cases will be reviewed on the record each week and will be formally reviewed at least every thirty (30) days. The inmate shall appear before the Institution Discipline Committee at such formal reviews unless the inmate refuses to appear without the use of force. (A standardized form for review is attached.)

There will be a psychiatric or psychological interview when Disciplinary Segregation continues beyond thirty (30) days. The interview and report should address the inmate's adjustment to his surroundings and the threat the inmate poses to himself, staff and other inmates. A similar psychiatric or pychological interview and report will be made at subsequent two (2) month intervals should segregation continue for this extended period.

An inmate shall be released from Disciplinary Segregation when he no longer poses a threat to himself, or others or to institutional security and when the Institution Discipline Committee determines that continuation in Disciplinary Segregation is no longer necessary to regulate an inmate's behavior within acceptable limits. The time an inmate spends in Disciplinary Segregation must be proportionate to the

offense committed, taking into consideration the inmate's prior conduct, his specific program needs, and other relevant factors.

(3) *Conditions of Disciplinary Segregation:*

(a) Basic living levels of decency and humane treatment must be maintained, regardless of the purpose for which a man has been segregated. Privileges may be added, for the purpose of reinforcing acceptable behavior, to the living conditions of those whose status is purely involuntary, or whose confinement is long-term. These should not result in excessively time-consuming procedures, or neutralize security or shakedown procedures.

(b) When different levels of living arrangements are effected, because of the difference in purpose of segregation, the differential facilities should be separated physically in ways that materials allowed to one person are not passed to others to whom they are not allowed.

(c) A description of basic living levels follows:

1. *Segregation Conditions:* The quarters used for segregation shall be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times. All cells will be equipped with beds. The beds may be securely fastened to the floor or wall of the cell according to the desires and needs of each individual institution. Strip cells will not be a part of the Segregation Unit. Any strip cells which will be utilized will be a part of the medical facility and under the supervision and control of the medical staff.

2. *Cell Occupancy:* Except in emergencies, the number inmates confined to each cell or room shall not exceed the number for which the space was designed. Whenever an emergency arises which indicates that excess occupancy may be temporarily needed, an immediate report shall be made to the head of the institution and his approval obtained.

3. *Clothing and Bedding:* All inmates shall be admitted to segregation dressed in normal institution clothing after a thorough search for contraband but without belt and shall be furnished a mattress and bedding. Cloth or paper slippers may be substituted for shoes at the discretion of the Warden. An inmate shall not be segregated without clothing, mattress, blankets and pillow, except when prescribed by the Medical Officer for medical or psychiatric reasons. If an inmate is so seriously disturbed that he is likely to destroy his clothing or bedding or create a disturbance which would be seriously detrimental to others, the Medical Department shall be notified immediately and a regimen of treatment and control instituted with the concurrence of the Medical Officer.

4. *Food:* As prescribed in existing regulations, segregated inmates shall be fed the normal institution meals on the standard ration and menu of the day for the institution. Disposable utensils may be used when necessary.

5. *Personal Hygiene:* Segregated inmates shall have the opportunity to maintain an acceptable level of personal hygiene, e.g., toilet tissue, wash basin, tooth brushing, eye glasses, etc. When necessary, for rea-

sons of safety or security, a retrievable kit of toilet articles may be issued. Each segregated inmate should shave and shower at least two (2) times a week, unless these procedures would present an undue security hazard.

6. *Exercise:* Each segregated inmate shall be permitted no less than two (2) hours exercise each week. Exercise should be provided in two (2), one (1) hour periods, but if circumstances require, one-half hour periods are acceptable if the two (2) hour minimum is maintained. This provision must be carried out unless compelling security or safety reasons dictate otherwise and these shall be documented.

7. *Personal Property:* Personal property will ordinarily be impounded.

8. *Reading Material:* Ordinarily, it may be provided on a circulating basis.

9. *Supervision:* In addition to the direct supervision afforded by the unit officer, each segregated inmate shall be seen daily by a member of the Medical Department, and one or more other responsible officer(s) designated in the local policy issuance.

10. *Correspondence and Visits:* Social correspondence privileges shall be continued in segregation unless there exist compelling reasons to the contrary. Every effort will be made to notify approved social visitors of any necessary restriction on ordinary visiting procedures so that they may be spared disappointment and unnecessary inconvenience. If ample time for correspondence exists, the burden of this notification may be placed on the inmate. In respect to legal, religious,

and PMB matters, the relevant policy statements should be followed.

11. *Records:*

a. A permanent log will be maintained in the segregation unit. All admissions will be recorded indicating date, reason for admission, and the authorizing official. All releases from the unit will be similarly recorded. Officials required to visit the unit will sign this log, giving time and date of visit. Unusual activity or behavior of individual inmates will be recorded in the log with a follow-up memorandum through the head of the institution for the inmate's file. This will include any misbehavior which should be recorded and reported to the Institution Discipline Committee.

b. A special Housing Unit Record Sheet (BP–IS–111) will also be maintained in accordance with the following instructions, and sent to the institution's central file.

1. The Key at the bottom of the form is self-explanatory.

2. The basic information at the top of the form, with the exception of the date and time of release, will be completed by the Officer in Charge/Unit Officer at time of admittance.

3. The form provides space for a period of up to seven (7) days. The date column will be recorded daily, the shift line will be completed commencing so as to coincide with the date and time the inmate is admitted as reflected at the top of the form.

4. The Officer in Charge/Unit Officer will sign the form in the space provided on line with the shift as indicated. Initials of the officer are not acceptable.

The Physician's Assistant will indicate by his signature in the proper space when an inmate received medication, is examined by a Medical Officer or Physician's Assistant, or requested to see a member of the medical staff. If no medication is received or request made during a shift, the officer may so indicate by recording "NO (N)" in the column.

6. The form is designed for a seven (7) day period, if confinement to segregation continues beyond a seven (7) day period, a new form will be prepared and the completed form forwarded to central file. Date and time of release will be recorded on the final form.

7. Additional comments may be noted on the reverse of the form and in each case, must be dated and include the signature and title of the person making the comment.

12. *Forms:*

a. Notice of Institution Discipline Committee Hearing (BP–IS–114), Locally Reproduced,

b. Inmate Rights at Institution Discipline Committee Hearing (BP–IS–113), Locally Reproduced,

c. Special Housing Record Sheet (BP–IS–111, Locally Reproduced. See Policy Statement 20,001.1B, Note: Title change must be entered manually on existing stock of forms. New forms will include these changes,

d. Incident Report (BP–IS–83A), Secured through regular FPI procurement sources, Note: See Policy Statement 7400.5D, Page 6 for change to Item 254, and addition of Item 257 which must be entered manually on existing stocks of forms. New forms will include these changes.

e. Institution Discipline Committee Report (BP–IS–115), Locally Reproduced, and

*f. Special Housing Review Forms (BP–IS–116), Locally Reproduced.

*13. *Disciplinary Procedures for Federal Community Treatment Centers:* The following exceptions to the general disciplinary procedures enumerated in this policy statement for Bureau of Prisons' Institutions are applicable solely to Federal Community Treatment Centers. All other procedures of this policy statement not affected below are applicable to Community Treatment Centers.

a. *Institution Discipline Committee:* Each Federal Community Treatment Center shall have a single Institution Discipline Committee composed of at least one staff member appointed by the Director of the Center. No member of the Institution Discipline Committee may be the reporting or investigating officer or have played any significant part in having the charge referred to the Institution Discipline Committee. Federal Community Treatment Centers need not establish unit or team discipline committees with minor disposition authority but may have only one discipline committee—the Institution Discipline Committee.

b. *Witnesses Requested at Institution Discipline Committee:* An inmate appearing before the Institution Discipline Committee shall be permitted to call witnesses from outside the Community Treatment Center who are willing to appear before the Institution Discipline Committee at their own expense and whose presence at the hearing would not pose a serious threat to the security of the Center. Witnesses

whose testimony would be repetitious or irrelevant to the charges or disposition need not be called. Where a request for an outside witness has been refused by the Institution Discipline Committee the reasons for refusing such requested witness shall be well documented and written statements from such requested witnesses shall be liberally accepted.

c. *Appeals of Disciplinary Actions:* Appeal of any disciplinary actions within a Federal Community Treatment Center may be made to the Director of the Center anytime within 30 days from the date the disciplinary action was imposed. This appeal and any subsequent appeal to the Regional Director or Assistant Director/General Counsel shall be filed pursuant to the provisions of Policy Statement 2001.6A, Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities.

d. *Offenders Programmed in the Center Pursuant to Public Law 91–492 (Probationers, Parolees, or Mandatory Releasees):* Reports of misconduct by offenders programmed in the Center pursuant to Public Law 91–492 shall be forwarded to the appropriate agency (Probation Office or Parole Board) for disposition that agency deems appropriate and shall not be the subject of disciplinary action within the Center. Immediate notification should be made where the misconduct is serious and arrangements for removal from the Center may be necessary for the protection of life or property.

e. *Escapes from Community Treatment Centers:* Should an offender escape, the facility will immediately notify the FBI, giving specific information about

the escape and listing the time and circumstances of the last contact. All file material will be made available to the local FBI and the U.S. Marshal in the course of their investigation. When an individual is not where he is scheduled to be, and when the facility staff has exhausted its resources to contact him, he will be declared by the facility staff to be in escape status. In *all* cases, the appropriate Community Programs Regional Administrator and/or MCC Director and the Correctional Services Regional Administrator will be notified as soon as possible during normal working hours.

In *all* escapes, the Standard Escape Report will be completed. Further action will be taken following the guidelines under Section 7.a above for handling Incident Reports. Total resolution of the incident must be effected, even to the point of holding the hearing(s) in absentia. In accordance with these instructions, the Escape Report will be treated as an Incident Report.

f. *Use of Part-Time Employees or Federal Family Employees in Disciplinary Process:* With the exception of sitting as a member of the Institution Discipline Committee part-time employees or Federal Family employees (U.S. Probation Officers or U.S. Marshals, etc.) may be used in any stage of the disciplinary process where there is an insufficient number of full-time staff available.

NORMAN A. CARLSON,
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